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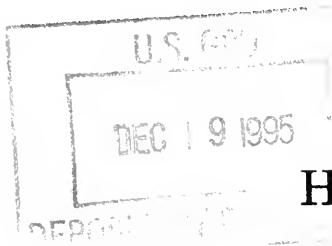
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S.HRG. 103-1031

Pt. 2

S. HRG. 103-1031, Pt. 2

CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS



HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

ON

CONFIRMATIONS OF APPOINTEES TO THE FEDERAL JUDICIARY

JANUARY 27; FEBRUARY 3, 24; MARCH 2, 3, 10, AND 16, 1994

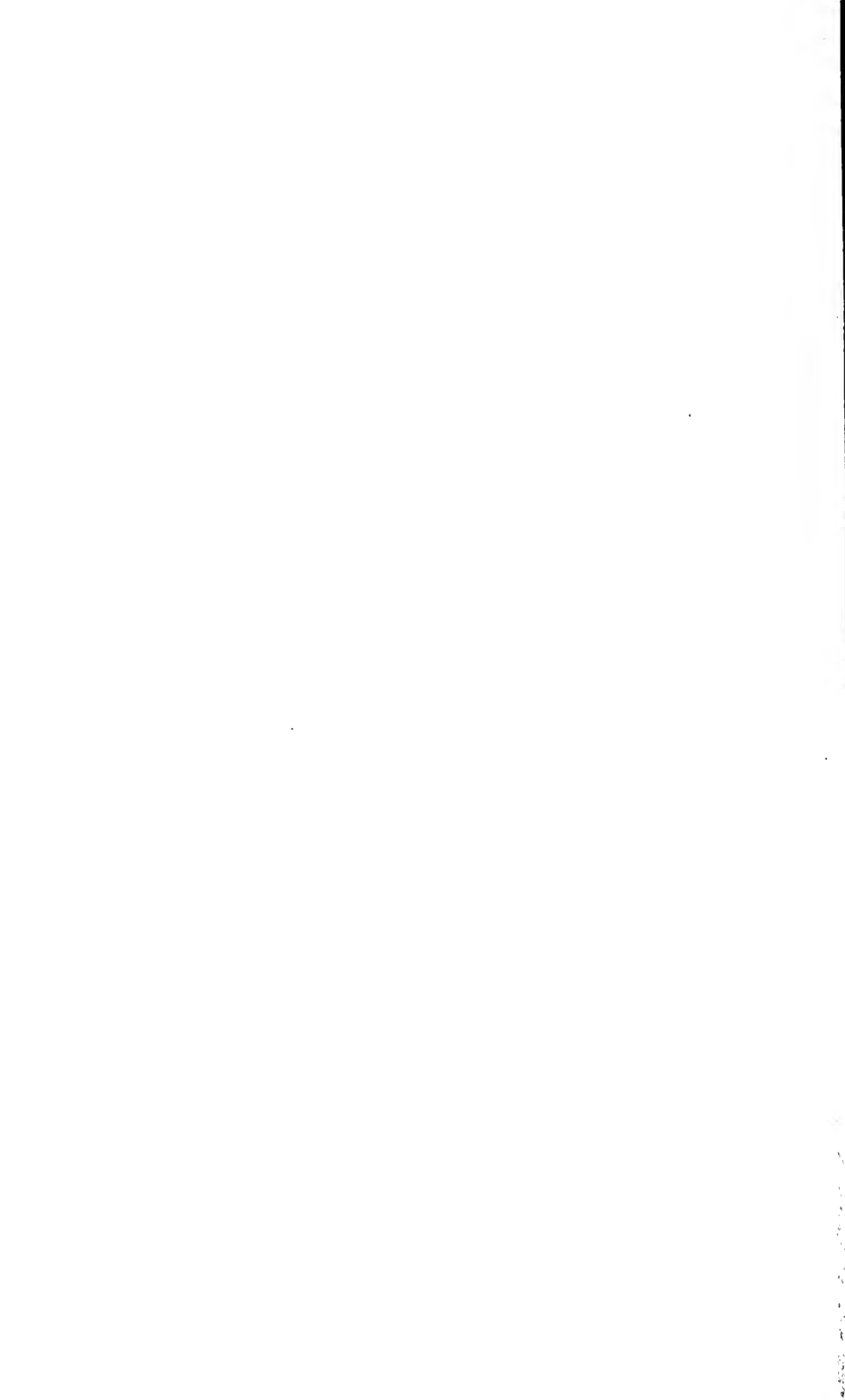
Part 2

Serial No. J-103-28

Printed for the use of the Committee on the Judiciary



1042-A



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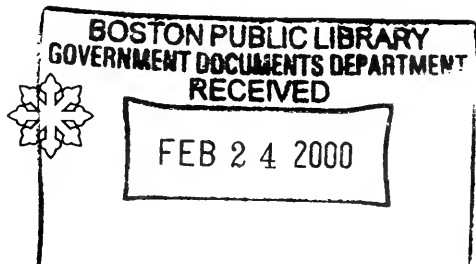
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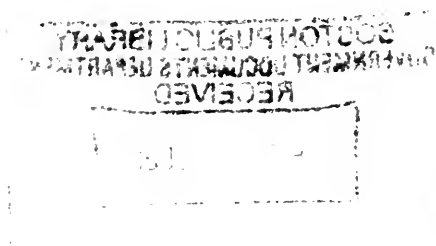
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(II)



CONTENTS

HEARING DATES

	Page
Thursday, January 27, 1994	1
Thursday, February 3, 1994	349
Thursday, February 24, 1994	511
Wednesday, March 2, 1994	675
Thursday, March 3, 1994	761
Thursday, March 10, 1994	959
Wednesday, March 16, 1994	1059

THURSDAY, JANUARY 27, 1994

STATEMENTS OF COMMITTEE MEMBERS

Kohl, Hon. Herbert	1
Cohen, Hon. William S	14

INTRODUCTION OF NOMINEES

Kennedy, Hon. Edward M	2
Specter, Hon. Arlen	3
Wofford, Hon. Harris	4
Glenn, Hon. John	6
Metzenbaum, Hon. Howard	7
Stokes, Hon. Louis	7
Norton, Hon. Eleanor Holmes	8
Breaux, Hon. John B	9
Jefferson, Hon. William J	11

TESTIMONY OF NOMINEES

Hon. Judith Ann Wilson Rogers, of Washington, DC, to be U.S. Circuit Judge for the District of Columbia	12
Hon. Michael A. Ponsor, of Massachusetts, to be U.S. District Judge for the District of Massachusetts	18
Hon. Lesley Brooks Wells, of Ohio, to be U.S. District Judge for the Northern District of Ohio	22
Marjorie Rendell, of Pennsylvania, to be U.S. District Judge for the Eastern District of Pennsylvania	27
Thomas Vanaskie, of Pennsylvania, to be U.S. District Judge for the Western District of Pennsylvania	30
Helen Georgena Berrigan, of Louisiana, to be U.S. District Judge for the Eastern District of Louisiana	34
Tucker Melancon, of Louisiana, to be U.S. District Judge for the Western District of Louisiana	39

ALPHABETICAL LIST AND MATERIAL SUBMITTED

Berrigan, Helen Georgena:	
Testimony	34
Questionnaire	230
Biden, Chairman Joseph R., Jr.:	
Letter from Charles A. Vanik, Washington, DC, Jan. 24, 1994	304

IV

Biden, Chairman Joseph R., Jr.—Continued	
Statement of Laurack D. Bray, opposing the confirmation of Judith Rogers	Page 305
Copies of two civil rights complaints filed in the U.S. District Court for the District of Columbia:	
<i>Alice Cheffield v. Henry F. Greene</i>	307
<i>Sceva J. Kendall v. John Ferren, John Terry, and Michael Farrell</i>	336
Melancon, Tucker:	
Testimony	39
Questionnaire	261
Court cases	283
Ponsor, Hon. Michael A.:	
Testimony	18
Questionnaire	69
Rendell, Marjorie:	
Testimony	27
Questionnaire	149
Rogers, Hon. Judith Ann Wilson:	
Testimony	12
Questionnaire	43
Vanaskie, Thomas:	
Testimony	30
Questionnaire	192
Wells, Hon. Lesley Brooks:	
Testimony	22
Questionnaire	113

THURSDAY, FEBRUARY 3, 1994

STATEMENTS OF COMMITTEE MEMBERS

Biden, Chairman Joseph R., Jr	349
Hatch, Hon. Orrin G	351
Moseley-Braun, Hon. Carol	353
Cohen, Hon. William S	353
Simon, Hon. Paul	374
Thurmond, Hon. Strom	380
Grassley, Hon. Charles E	391

INTRODUCTION OF NOMINEE

Graham, Hon. Bob	354
Mack, Hon. Connie	357
Chiles, Hon. Lawton	376

TESTIMONY OF NOMINEE

Hon. Rosemary Barkett, of Florida, to be a U.S. Circuit Judge for the Eleventh Circuit	359
--	-----

ALPHABETICAL LIST AND MATERIAL SUBMITTED

Barkett, Hon. Rosemary:	
Testimony	359
Questionnaire	429
Disler, Mark:	
Letter to Chairman Biden, Apr. 13, 1994	481
Chairman Biden's response, Apr. 15, 1994	482
Excerpt from the Congressional Record, Oct. 7, 1994	483
Graham, Hon. Bob:	
Prepared statement	356
Articles relating to the nomination of Rosemary Barkett:	
The Miami Herald, Sept. 28, 1993	484
The News-Journal, Sept. 28, 1993	485
The Orlando Sentinel, Sept. 29, 1993	486
Sun-Sentinel, Oct. 1, 1993	487
The Tampa Tribune, Oct. 2, 1993	488

Graham, Hon. Bob—Continued

Articles relating to the nomination of Rosemary Barkett—Continued

	Page
The News-Journal, Oct. 18, 1993	489
St. Petersburg Times, Oct. 19, 1993	490
Tallahassee Democrat, Oct. 21, 1993	491
Fort Lauderdale Sun-Sentinel, Oct. 21, 1993	492
Sarasota Herald-Tribune, Oct. 22, 1993	493
Gainesville Sun, Oct. 23, 1993	494
The Palm Beach Post, Oct. 24, 1993	495
The Orlando Sentinel, Oct. 25, 1993	496
Florida Clipping Service, Inc., Oct. 26, 1993	497
The Orlando Sentinel, Oct. 31, 1993	498
The New York Times, Nov. 5, 1993	499
Ocala Star Banner, Nov. 8, 1993	500
News-Press, Nov. 13, 1993	501
Miami Times, Nov. 18, 1993	502
The Wall Street Journal, Nov. 29, 1993	503
The New Yorker, Dec. 20, 1993	504
St. Petersburg Times, Dec. 21, 1993	506
Gainesville Sun, Dec. 23, 1993	507
The Atlanta Journal, Dec. 26, 1993	508
Hatch, Hon. Orrin G.:	
Questions for Chief Justice Barkett	469
Responses from Chief Justice Barkett	472
Supplemental questions for Chief Justice Barkett and her responses	476
Simon, Hon. Paul:	
Letter to Chairman Biden from the National Association of Police Organi- zations, Inc., Washington, DC, Oct. 22, 1993	375
Thurmond, Hon. Strom:	
Questions for Chief Justice Barkett	477
Responses from Chief Justice Barkett	480

THURSDAY, FEBRUARY 24, 1994

STATEMENTS OF COMMITTEE MEMBERS

Heflin, Hon. Howell	511
Brown, Hon. Hank	518

INTRODUCTION OF NOMINEES

Hutchison, Hon. Kay Bailey	511
Brooks, Hon. Jack	512
Coleman, Hon. Ronald D	513
Bryant, Hon. John	513
Tejeda, Hon. Frank	514
Ortiz, Hon. Solomon P	525

TESTIMONY OF NOMINEES

Samuel Frederick Biery, Jr., San Antonio, TX, to be U.S. District Judge for the Western District of Texas	518
William Royal Furgeson, Jr., El Paso, TX, to be U.S. District Judge for the Western District of Texas	519
Orlando Luis Garcia, San Antonio, TX, to be U.S. District Judge for the Western District of Texas	521
John Henry Hannah, Jr., Tyler, TX, to be U.S. District Judge for the Eastern District of Texas	523
Janis Ann Graham Jack, Corpus Christi, TX, to be U.S. District Judge for the Southern District of Texas	524

ALPHABETICAL LIST AND MATERIAL SUBMITTED

Biery, Samuel Frederick, Jr.:	
Testimony	518
Questionnaire	527

VI

Furgeson, William Royal, Jr.:	Page
Testimony	519
Questionnaire	554
Garcia, Orlando Luis:	
Testimony	521
Questionnaire	580
Hannah, John Henry, Jr.:	
Testimony	523
Questionnaire	606
Jack, Janis Ann Graham:	
Testimony	524
Questionnaire	638

WEDNESDAY, MARCH 2, 1994

STATEMENTS OF COMMITTEE MEMBERS

Biden, Chairman Joseph R., Jr	675
Prepared statement	677
Hatch, Hon. Orrin G	682
Prepared statement	683
Grassley, Hon. Charles E	696

INTRODUCTION OF NOMINEE

Moynihan, Hon. Daniel Patrick	678
D'Amato, Hon. Alfonse	680
Prepared statement	681
McNulty, Hon. Michael R	685
Quinn, Hon. Jack	685
Prepared statement	686

TESTIMONY OF NOMINEE

Thomas A. Constantine, Schenectady, NY, to be Administrator, U.S. Drug Enforcement Administration	688
---	-----

ALPHABETICAL LIST AND MATERIAL SUBMITTED

Biden, Chairman Joseph R., Jr.:	
List of law enforcement organizations and former DEA Administrators supporting the nomination	692
Questions for Superintendent Thomas Constantine and his responses	747
Constantine, Thomas Arthur:	
Testimony	688
Questionnaire	716
Leahy, Hon. Patrick J.:	
Questions for Superintendent Thomas Constantine and his responses	756
Moynihan, Hon. Daniel Patrick:	
Reprint from the American Scholar: "Iatrogenic Government"	734
Chart of homicides per 100,000	746

THURSDAY, MARCH 3, 1994

STATEMENTS OF COMMITTEE MEMBERS

Feinstein, Hon. Dianne	761
Thurmond, Hon. Strom	764

INTRODUCTION OF NOMINEES

Hollings, Hon. Ernest F	762
Murray, Hon. Patty	764
Wellstone, Hon. Paul	765
Hatfield, Hon. Mark O	766
Wyden, Hon. Ron	767
Graham, Hon. Bob	768

VII

Graham, Hon. Bob—Continued	Page
Prepared statement	769
Johnston, Hon. Harry	770
Durenberger, Hon. Dave	789

TESTIMONY OF NOMINEES

Cameron Currie, Columbia, SC, to be U.S. District Judge for the District of South Carolina	770
Franklin D. Burgess, Tacoma, WA, to be U.S. District Judge for the Western District of Washington	776
Michael Davis, Minneapolis, MN, to be U.S. District Judge for the District of Minnesota	779
Ancer Haggerty, Portland, OR, to be U.S. District Judge for the District of Oregon	783
Daniel T.K. Hurley, South Palm Beach, FL, to be U.S. District Judge for the Southern District of Florida	786

ALPHABETICAL LIST AND MATERIAL SUBMITTED

Biden, Chairman Joseph R., Jr.:	
Letter in opposition to the appointment of Judge Ancer Haggerty to the Federal bench, from Roy B. Thompson, P.C., Portland, OR, Mar. 2, 1994	955
Letter in support of the nomination of Judge Michael James Davis to be a U.S. district judge for the District of Minnesota, from Members of Congress, House of Representatives, Washington, DC, Mar. 3, 1994 ..	958
Burgess, Franklin Douglas:	
Testimony	776
Questionnaire	814
Currie, Cameron:	
Testimony	770
Questionnaire	791
Davis, Michael:	
Testimony	779
Questionnaire	830
Haggerty, Ancer:	
Testimony	783
Questionnaire	884
Hurley, Daniel T.K.:	
Testimony	786
Questionnaire	918

THURSDAY, MARCH 10, 1994

STATEMENTS OF COMMITTEE MEMBERS

Biden, Chairman Joseph R., Jr	959
Hatch, Hon. Orrin G	960
Simon, Hon. Paul	965
Thurmond, Hon. Strom	983
Metzenbaum, Hon. Howard M	986
Simpson, Hon. Alan K	988
Feinstein, Hon. Dianne	991
Cohen, Hon. William S	994
Moseley-Braun, Hon. Carol	997
Prepared statement	1000
Grassley, Hon. Charles E	1001
Heflin, Hon. Howell	1005
Specter, Hon. Arlen	1006
Leahy, Hon. Patrick J	1010

INTRODUCTION OF NOMINEE

Kerry, Hon. John F	962
Prepared statement	964
Coppersmith, Hon. Sam	965

VIII

Coppersmith, Hon. Sam—Continued	Page
Prepared statement	967
Kennedy, Hon. Edward M	972

TESTIMONY OF NOMINEE

Deval L. Patrick, to be Assistant Attorney General for Civil Rights, U.S. Department of Justice	968
---	-----

ALPHABETICAL LIST AND MATERIAL SUBMITTED

Biden, Chairman Joseph R., Jr.:	
Letters from:	
Hill & Barlow, Boston, MA, Mar. 2, 1994	1051
Massachusetts Black Lawyers Association, Boston, MA, Mar. 9, 1994	1053
U.S. Department of Justice, Washington, DC, Mar. 14, 1994, with Deval Patrick's responses to Senator Pressler's written questions ...	1055
Coppersmith, Hon. Sam:	
"The Right Person Is Put Forward for Civil Rights Post", by Judge Stephen Reinhardt, from the Los Angeles Times, Feb. 21, 1994	1050
Kennedy, Hon. Edward M.:	
Prepared statement of the Lawyers' Committee for Civil Rights Under Law	1010
Patrick, Deval L.:	
Testimony	968
Prepared statement	971
Questionnaire	1013

WEDNESDAY, MARCH 16, 1994

STATEMENTS OF COMMITTEE MEMBERS

Biden, Chairman Joseph R., Jr	1059
Hatch, Hon. Orrin G	1061
Simon, Hon. Paul	1071
Moseley-Braun, Hon. Carol	1078
Prepard statement	1078
Feinstein, Hon. Dianne	1078
Thurmond, Hon. Strom	1081
Metzenbaum, Hon. Howard M	1085
Grassley, Hon. Charles E	1088
Cohen, Hon. William S	1090
Specter, Hon. Arlen	1099

INTRODUCTION OF NOMINEE

Mikulski, Hon. Barbara	1064
Sarbanes, Hon. Paul S	1064
Morella, Hon. Constance A	1065

TESTIMONY OF NOMINEE

Jamie S. Gorelick, to be Deputy Attorney General, U.S. Department of Justice	1067
--	------

ALPHABETICAL LIST AND MATERIAL SUBMITTED

Biden, Chairman Joseph R., Jr.:	
Letter from the U.S. Department of Justice, Washington, DC, May 12, 1994	1154
Attachments—Jamie Gorelick's responses to questions submitted by:	
Senator Leahy	1155
Senator Simpson	1158
Senator Pressler	1159
DOJ memorandums to:	
Janet Reno, Attorney General, from 18 trial lawyers, Environmental Crimes Section, Mar. 3, 1994	1165

Biden, Chairman Joseph R., Jr.—Continued	Page
DOJ memorandums to—Continued	
All section line attorneys, from Messrs. Miskiewicz, Murtha, Nagle, and Uhlman, Mar. 4, 1994	1167
Gorelick, Jamie:	
Testimony	1067
Questionnaire	1111
Moseley-Braun, Hon. Carol:	
Letter from the Hispanic Bar Association of the District of Columbia, Washington, DC, Mar. 15, 1994	1169

ALPHABETICAL LIST OF NOMINEES FOR FEDERAL APPOINTMENTS

Barkett, Hon. Rosemary, of Florida, to be U.S. Circuit Judge for the Eleventh Circuit	359
Berrigan, Helen Georgena, of Louisiana, to be U.S. District Judge for the Eastern District of Louisiana	34
Biery, Samuel Frederick, Jr., San Antonio, TX, to be U.S. District Judge for the Western District of Texas	518
Burgess, Franklin D., Tacoma, WA, to be U.S. District Judge for the Western District of Washington	776
Constantine, Thomas A., Schenectady, NY, to be Administrator, U.S. Drug Enforcement Administration	688
Currie, Cameron, Columbia, SC, to be U.S. District Judge for the District of South Carolina	770
Davis, Michael, Minneapolis, MN, to be U.S. District Judge for the District of Minnesota	779
Furgeson, William Royal, Jr., El Paso, TX, to be U.S. District Judge for the Western District of Texas	519
Garcia, Orlando Luis, San Antonio, TX, to be U.S. District Judge for the Western District of Texas	521
Gorelick, Jamie S., to be Deputy Attorney General, U.S. Department of Jus- tice	1067
Haggerty, Ancer, Portland, OR, to be U.S. District Judge for the District of Oregon	783
Hannah, John Henry, Jr., Tyler, TX, to be U.S. District Judge for the Eastern District of Texas	523
Hurley, Daniel T.K., South Palm Beach, FL, to be U.S. District Judge for the Southern District of Florida	786
Jack, Janis Ann Graham, Corpus Christi, TX, to be U.S. District Judge for the Southern District of Texas	524
Melancon, Tucker, of Louisiana, to be U.S. District Judge for the Western District of Louisiana	39
Patrick, Deval L., to be Assistant Attorney General for Civil Rights, U.S. Department of Justice	968
Ponsor, Hon. Michael A., of Massachusetts, to be U.S. District Judge for the District of Massachusetts	18
Rendell, Marjorie, of Pennsylvania, to be U.S. District Judge for the Eastern District of Pennsylvania	27
Rogers, Hon. Judith Ann Wilson, of Washington, DC, to be U.S. Circuit Judge for the District of Columbia	12
Vanaskie, Thomas, of Pennsylvania, to be U.S. District Judge for the Western District of Pennsylvania	30
Wells, Hon. Lesley Brooks, of Ohio, to be U.S. District Judge for the Northern District of Ohio	22

NOMINATIONS OF JUDITH ANN WILSON ROGERS, TO BE U.S. CIRCUIT COURT JUDGE; MICHAEL A. PONSOR; LESLEY BROOKS WELLS; MARJORIE RENDELL; THOMAS VANASKIE; HELEN GEORGENA BERRIGAN; AND TUCKER MELANCON, TO BE U.S. DISTRICT JUDGES

THURSDAY, JANUARY 27, 1994

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:03 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Herb Kohl presiding. Also present: Senators Kennedy, Metzenbaum, Specter, and Cohen.

OPENING STATEMENT OF SENATOR KOHL

Senator KOHL. This hearing will come to order.

This afternoon, the Judiciary Committee will conduct a hearing on the following judicial nominees: Judge Judith Rogers, of the District of Columbia, to be circuit court judge for the District of Columbia Court of Appeals; Judge Michael Ponsor, to be district court judge for the District of Massachusetts; Judge Lesley Brooks Wells, to be district court judge for the Northern District of Ohio; Marjorie Rendell, to be district court judge for the Eastern District of Pennsylvania; Thomas Vanaskie, to be district court judge for the Middle District of Pennsylvania; Helen Berrigan, to be district court judge for the Eastern District of Louisiana; and Tucker Melancon, to be district judge for the Western District of Louisiana.

As is customary, we will hear first from Senators and Representatives who wish to introduce nominees to the committee. But before we turn to them, let me state for the record that each nominee has completed a detailed questionnaire on his or her qualifications, experience, finances, and philosophy. The portions of the questionnaires available to the public will be printed in the record of this hearing.

We understand that we may receive written testimony about the nomination of Judith Rogers from Larac Bray. We will keep the record open for a limited time for any other written testimony submitted to the committee, and just in case members of the committee would like to submit written questions. Of course, we will place

in the record the full introductory statements of home State Senators.

Are there any other comments from Senators before we move on to introductions?

[No response.]

We have a number of very distinguished Senators and Representatives who are with us today, and we would like to begin with them as they introduce the nominees from their State. First we would like to ask Senator Kennedy and, if he is here, Senator Kerry to speak in behalf of Judge Ponsor, if Judge Ponsor would come forward.

**STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR
FROM THE STATE OF MASSACHUSETTS**

Senator KENNEDY. Thank you very much, Mr. Chairman and Senator Specter.

I want to follow the adage that the shorter the introduction, the more rapidly the committee considers the nominee, so I will not take a great deal of time. But I want to say what a real honor it is to be able to recommend to this committee and to the Senate a really extraordinary candidate for judge for the Federal district court in Massachusetts.

Michael Ponsor has been associated with excellence since the earliest days of his life, an absolutely brilliant student in his early days and his primary and secondary days, an outstanding academic record in college at Harvard University, was awarded a Rhodes Scholarship and later at Yale, has had a brilliant career in the law in the private sector among many of our outstanding law firms in Boston and western Massachusetts; currently serves as a magistrate.

As you know, Mr. Chairman, magistrates, with the agreement of the parties, can serve as the judge in civil cases. It is a fact that Michael Ponsor has served with the confidence of the parties more than all of the other magistrates in Massachusetts combined. I think this is a very clear indication of the kind of confidence that those that have respect for the law and have a sense of his fairness and his judiciousness have taken.

One of the qualities of Michael Ponsor that I find most appealing is his interest in community and pro bono work. In high school, he was involved in tutoring children. In college, in his junior year, he went and taught English in Kenya. He is the only person that I have ever known or that probably has been before this committee that speaks Swahili as well as Finnish.

When he was in law school, he served in the Legal Defenders and spent a great deal of time both in law school at Yale and also in the practice of the law with pro bono work. He probably has had as much pro bono work as many, many other individuals combined before this committee.

We had set up, John Kerry and I, a group of men and women, distinguished men and women of the bar in Massachusetts. That committee was chaired by Mr. Curtin, who was the former president of the ABA, and had many distinguished members.

They had recommended to Senator Kerry and to myself Michael Ponsor, and we had the opportunity of reviewing the background

and the experience and the temperament of individuals, Michael Ponsor and others, and Senator Kerry and I have a great sense of pride in recommending his name to the President, and we feel that the President has selected wisely in sending him to this committee. I know that he will be an outstanding judge. He served as a clerk to Judge Tauro, who is the chief of our court, and Judge Tauro, who is one of our most distinguished members, has nothing but the highest praise and recommendation of this nominee.

I am proud to make the recommendation, and I look forward to favorable approval by the committee and the Senate.

Thank you.

Senator KOHL. Thank you very much, Senator Kennedy.

I notice that Senator Kerry is guiding legislation on the floor at this time and wanted to be here.

Senator KENNEDY. He wanted to have his remarks included. I know I spoke for him when I made those comments, and if he was not on the floor, he would be over here.

If I could just take 30 seconds more, it is a personal delight for me also to say that Judge Rendell has been nominated, and I have known the family for many, many years—intelligent, thoughtful, committed to law. He has been a very dear and wonderful, valued friend, and I know will be an outstanding judge.

Senator KOHL. We thank you.

We thank you, Judge Ponsor. We will get back to you.

Second, we have here with us today Senators Specter and Wofford, who will be speaking in behalf of Ms. Rendell and also Mr. Vanaskie. If they would come forward, please, Ms. Rendell and Mr. Vanaskie.

Senator Specter.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you very much, Mr. Chairman.

It is easier to find a seat up here today than it is in the hearing room, so I will exercise my prerogative as being both an introducer and a committee member. It is not to be both a litigant and a judge in the same case.

I have the distinct pleasure, along with my colleague Senator Wofford, to present to the committee two very distinguished lawyers.

Ladies first, Marjorie Rendell has an outstanding academic record, graduating cum laude from the University of Pennsylvania, and graduating from Villanova Law School. She has worked with the very prestigious law firm, Duane, Morris & Heckscher in Philadelphia, for more than 20 years, and she has a really outstanding record.

Beyond those formal qualifications, I can personally attest to knowing Midge Rendell from the time she came to a district attorney's party in Philadelphia with a young assistant district attorney whom she married in 1971. And with her tutelage and instruction, he became the district attorney of Philadelphia, and he is now the mayor of Philadelphia.

There is an old story, which I will take just 1 minute to tell. It was first told to me about Mayor Flaherty of Pittsburgh, and I be-

lieved it at the time. He was married to a very distinguished woman, Nancy Flaherty, and they were walking along and ran into a fellow coming out of a sewer pond. Mrs. Flaherty recognized the young man and greeted him, and, as they walked away, told Mayor Flaherty that they used to date. He said to her, "Aren't you glad you married me? I'm the Mayor of Pittsburgh." As you may have guessed by now, she said, "If I had married him, he would have been the Mayor of Pittsburgh." [Laughter.]

I thought that was a true story, and perhaps it is. Midge Rendell is married to Ed Rendell, the mayor, and has a very, very distinguished professional career in her own right, and I am delighted to see her nominated here today.

If I may proceed now with Mr. Tom Vanaskie, another very distinguished lawyer: Tom Vanaskie is a graduate of the Dickinson School of Law, a cum laude. He clerked for Judge William Nealon, a very distinguished jurist in the Middle District of Pennsylvania. He was associated with a very outstanding and prestigious law firm, Dilworth, Paxson, Lalish & Kauffman, for 2 years, at a time when I believe the current Governor of Pennsylvania, Governor Casey, was associated with the firm. He has been in his own firm, Elliott, Vanaskie & Riley, for the past decade.

He hails from Scranton, PA, and has promised to be an outstanding district judge, and I am delighted to join with Senator Wofford in presenting Ms. Rendell and Mr. Vanaskie to the committee today.

Senator KOHL. Thank you very much, Senator Specter.
Senator Wofford.

STATEMENT OF HON. HARRIS WOFFORD, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator WOFFORD. Senator Kohl, Mr. Chairman, Senator Cohen, my senior Senators. I thank you, Arlen.

It is my pleasure to come here today to introduce two Pennsylvanians that the President has nominated for the U.S. district court. First, to my right is Thomas Vanaskie, who is a nominee for the Federal District Court for the Middle District of Pennsylvania. With him today is his family, his wife Dorothy, and his three children, Diane, Laura, and Tommy.

Would you stand? Thank you, Vanaskies all.

Tom comes from the central portion of our State, a small coal mining town called Schmoken, where he learned the value of hard work from his parents, his father a seasonal bricklayer and local labor leader, and his mother a shirt factory worker. By the time he graduated from law school, Tom had worked as a paper boy, a service station attendant, a dishwasher, a fast-food worker, a tree planter, an assembly line worker, a stock boy, and as a construction worker, and probably a few other things.

He also found time to distinguish himself academically, graduate magna cum laude from Lycoming College in Williamsport, and graduating cum laude from Dickinson School of Law in Carlisle, where he ranked fourth in his class and was a member of the Law Review editorial staff.

After law school, Tom clerked for 2 years with then Chief Judge William Nealon of the U.S. District Court for the Middle District.

And for the past 14 years, he has been in private practice and is currently a partner and vice president of Elliott, Vanaskie & Riley in Scranton.

During his years of practice, Tom has been an active member of eight bar associations, a recognized leader of the middle district bar. He was appointed to the Lawyers Advisory Committee of the U.S. District Court for the Middle District in 1992, and the next year he was appointed to the Civil Justice Reform Act Committee for the middle district bench.

I know he will be a fine addition to the middle district bench.

Next, Marjorie "Midge" Rendell, who the President has nominated to the U.S. District Court for the Eastern District of Pennsylvania. She is accompanied by her husband Ed Rendell, Ed the mayor, and their son Jesse.

Would you stand? Thank you.

Midge was born in our neighboring State, the chairman of this committee's State of Delaware, but thereafter she graduated cum laude from the University of Pennsylvania, where she was as member of Phi Beta Kappa. She attended Georgetown University Law School, where she was asked to join the school's law journal, before she transferred and then graduated from Villanova Law School.

She began her legal career in 1973 at the Philadelphia firm of Duane, Morris & Heckscher, where she is now a partner and leader of the reorganization and finance section. She is a recognized expert on issues of bankruptcy and commercial finance law, a subject on which she has written articles and conducted numerous seminars and presentations.

In addition to her reputation as a respected member of both the Philadelphia and Pennsylvania bars, Midge Rendell has been a civic leader. She serves on the boards of the Academy of Vocal Arts, as vice chair of the Avenue of the Arts, Inc., the Market Street East Improvement Association, Pennsylvania's Campaign for Choice, Philadelphia Friends for Outward Bound, and vice chair of the board of trustees for the Visiting Nurses Association of Greater Philadelphia, and on the board of managers of the Visiting Nurses Society.

She is engaged in pro bono activity that includes work as a mediator with the U.S. District Court for the Eastern District, and is a board member of the Philadelphia Bar Foundation.

She is that rare individual who combines the talent of people skills with intellectual and professional ability, to make a positive contribution to the people and institutions around her. I am certain she will do the same as an outstanding member of the eastern district bench.

Again, I express my delight at being able to present to you two nominees who are fair, principles, intelligent, and dedicated lawyers, who will make excellent Federal judges.

Senator KOHL. We thank you very much, Senator Wofford.

We will get back to you in just a short while, my friends.

Next we have here Judge Wells, who will be introduced by Senator Metzenbaum, Senator Glenn, and also Congressman Lewis Stokes.

Senator Glenn.

**STATEMENT OF HON. JOHN GLENN, A U.S. SENATOR FROM
THE STATE OF OHIO**

Senator GLENN. Thank you, Mr. Chairman and members of the committee.

It is a real pleasure for me to be here this afternoon to present to you Judge Lesley Brooks Wells. With so many qualified persons in Ohio, the decision of who to recommend for this post was not an easy one. And I know you are all aware that Judge Wells has sterling legal credentials and a distinguished legal background. But what sets Judge Wells apart for me was her commitment to public service and her willingness to face head-on the tough issues which plague our society.

I do not believe that it is enough for the people we entrust with the awesome responsibility of serving on the Federal bench to know just legal theory. In order to perform their job effectively, I believe they should also feel a deep sense of responsibility to society. And through her actions, Judge Wells has proven her commitment to society and she has wrestled with many of the difficult issues that a Federal judge must face.

For 3 years, she traveled throughout Ohio as chair of the Governor's Task Force on Family Violence. The task force focused on child abuse, elder abuse, domestic violence, all vitally important issues afflicting modern American society.

She has also been a shining example of the good that lawyers can do, if they just put their minds to it. It was her leadership that established a citywide pro bono program, encouraging all lawyers in her native Cleveland to reach out and give a little something back.

Judge Wells has also been a real inspiration in Ohio, working on such difficult issues as mental health and counseling, legal aid, and improving the health care received by residents of Cleveland's inner-city.

Mr. Chairman and members of the committee, we could go on with other accomplishments and accolades, but I think you get the idea. In her life and in her work, she has proven that one person really can make a difference.

I respectfully ask the members of this committee to allow Judge Wells to continue making a difference and to serve as a positive force of commitment, integrity, and responsibility on the Federal bench.

I think Judge Wells' two daughters are here today, and I would like to introduce them. I think Karen and Christen are back in the back here.

Would you stand up? Thank you.

And thank you, Mr. Chairman. I am glad to recommend Judge Wells and give my unqualified recommendation. I know that she will be a great Federal judge.

Senator KOHL. Thank you, Senator Glenn.

Senator Metzenbaum.

**STATEMENT OF HON. HOWARD M. METZENBAUM, A U.S.
SENATOR FROM THE STATE OF OHIO**

Senator METZENBAUM. Mr. Chairman, I am pleased to join Senator Glenn and Congressman Lew Stokes in support of the nomination of Judge Lesley Brooks Wells.

It comes as no surprise that those who know Judge Wells, that President Clinton has nominated her to serve on the Federal bench. That is where she should be, and I hope that, as a result of this committee's deliberations and the Senate action, that she will be on that bench.

Her dedication to legal excellence and public service make her an outstanding candidate to serve on the Federal district bench, and she deserves our support.

One of the reasons that she will be an excellent Federal judge is her ability to put herself in the shoes of the parties that appear before her. Her ability stems from the fact that she has a diverse legal and nonlegal background that few can match.

After obtaining her B.A. from Chatham College in 1959, and raising a family, she is one of those pioneering women in the 1970's who made the law their second career. Since that time, she has been a sole practitioner, an equal employment opportunity litigation director, an adjunct professor of law and urban studies at several Ohio universities.

In 1983, she was appointed to the Court of Common Pleas in Cuyahoga County, OH. During her term on the bench, she has literally served with distinction and is well known for her fairness, for her scholarship, and her wonderful judicial temperament.

Despite the rigorous schedule one must keep as a trial judge, she has made the time to volunteer at a free medical clinic. Her energy and enthusiasm for life and the law and public service seems to have no bounds.

I urge this committee to promptly move forward with her nomination and send her name to the entire Senate for confirmation.

Senator KOHL. Thank you very much, Senator Metzenbaum.
Congressman Stokes.

**STATEMENT OF HON. LOUIS STOKES, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF OHIO**

Mr. STOKES. Thank you very much, Mr. Chairman.

It is an honor for me to join my two distinguished Senators from the State of Ohio, Senator Glenn and Senator Metzenbaum, here this afternoon in behalf of the nomination of Judge Lesley Brooks Wells.

One of the things I think distinguishes this lady, along with the outstanding and exemplary legal career she has had is that she was a person characterized with a strong community activist record in our community for 30 years. While raising her four children, she was involved in the community school activities and development of a stable, integrated community.

Mr. Chairman, while raising her children, she went to law school and served in a variety of legal positions, specializing in civil rights, with a strong involvement in matters involving ethics. Her law practice was also extremely diverse. She is an individual who

has served all the way from a neighborhood law office to one of Cleveland's oldest law firms.

During this period, she has been very active in the political life of our community, and extremely active in matters related to the Democratic Party in the State of Ohio. The political organization which I happen to chair in Cleveland always endorsed her in every one of her races. She was one of the persons in our community whom we felt was one of the finest public servants that we have had the privilege of supporting.

She brings to this nomination and to this room today great background in terms of her service on the bench, both in domestic relations court and several years on the common pleas court bench. Throughout her career, in all of her ratings she has been rated extremely high, both in terms of scholarship and integrity. She is the type of judge who can face the type of tough issues faced by a Federal court judge. She has been a professor of law. She is a prolific writer on legal matters.

I would just like to close by reading just a brief paragraph from a letter she dropped to me last year when she was here in conjunction with her nomination and had been over to see the two Senators. She stopped by my office and she wrote me a letter after her return to Cleveland, and I just want to read this paragraph from that letter:

When I left your office, I walked to the Supreme Court to pay my respects to Mr. Justice Marshall. Walking past the men and women calmly waiting became a powerful experience. There was no stiff solemnity, no restlessness in the long lines, just respect and a kind of solid comfort. Your experience arguing the Terry case ran through my mind. People talked in line about Justice Marshall, what he meant to them, why they were there. Loss was expressed, but joy, too, especially for his courage and example. It was a gathering I won't forget. Fierce for justice how I think of him, and a powerful example to every one of us.

I think that those words exemplify the characteristics that this distinguished lady would bring to the Federal judiciary, and I would urge this distinguished committee to confirm her nomination.

I thank you, Mr. Chairman.

Senator KOHL. Thank you very much, Congressman Stokes, Senator Glenn and Senator Metzenbaum.

Before we ask you to step down, and we will ask you back in a minute, I would just like to ask you in a word, Judge Wells, can you confirm the veracity of everything that has been said about you? [Laughter.]

Judge WELLS. It is time for silence.

Senator KOHL. You have not taken the oath yet. [Laughter.]

We have Judge Judith Rogers, who will step up now, and the District Delegate Eleanor Holmes Norton along with her to introduce her.

STATEMENT OF HON. ELEANOR HOLMES NORTON, A REPRESENTATIVE IN CONGRESS FROM THE DISTRICT OF COLUMBIA

Ms. NORTON. Thank you, Mr. Chairman.

It is a great pleasure and a real privilege to be able to introduce to you this afternoon a woman of well-known accomplishments in

this city. I recognize that it is not necessary to call the entire roll on her long list of accomplishments.

May I say, though, that chief judge Judith Rogers, Chief Judge of the District of Columbia Court of Appeals, has spent her life in the law, and much of that life already as a judge in a way that has profoundly prepared her for the role that President Clinton has nominated her to assume.

Chief Judge Rogers has served for more than 10 years on our court of appeals, and for half of that time she has been chief judge. She was chosen as chief judge when there were judges considerably more senior, an indication of the regard in which she is held, because of both her intellect and her leadership ability.

Before coming to the court of appeals, Judge Rogers served as corporation counsel for the District of Columbia, and before that as an attorney in the U.S. Department of Justice. She has also served as an assistant U.S. attorney for the District of Columbia.

Judge Rogers is a graduate with honors of Radcliffe and a graduate, as well, of Harvard Law School. I have personally seen Judge Rogers at work in a way that makes me not only comfortable, but very proud to recommend her. She has made distinguished contributions to our civil and criminal justice system. She has worked with tenacity to improve that system, both structurally and legally. Many of us cannot imagine that court now without Chief Judge Rogers at the helm.

Mr. Chairman, may I say that, as I have already heard, you will have before you many distinguished candidates. I believe it is rare that you will find a candidate of the quality of Chief Judge Judith Rogers, and I am pleased to recommend her for the position of a judge on the U.S. Court of Appeals for the District of Columbia.

Senator KOHL. Thank you for that very kind introduction.

We will get back to you in just a few minutes.

We now have Helen Berrigan and Tucker Melancon who will step forward, along with their introducers.

Senator Breaux.

STATEMENT OF HON. JOHN B. BREAU, A U.S. SENATOR FROM THE STATE OF LOUISIANA

Senator BREAU. Thank you very much, Mr. Chairman and Senator Cohen, for allowing us to present Ginger Berrigan and Tucker Melancon to the committee for approval of their nominations to the district courts in Louisiana, the Federal district court.

Tucker Melancon, if there is ever any question about his desire and willingness to serve in this position, let me assure this committee that this is an individual who has called me daily for the last 4 months asking me when we would get to this day. He has the strong desire and willingness to serve, and I, without question, recommend him for approval by this committee.

All of our nominees are going to be extremely well qualified in the law, and Tucker is no different in that regard, having graduated from Louisiana State University and a degree in law from Tulane University in Louisiana.

But he also brings to this committee I think something that is very important for all of our judges in our system, and that is a knowledge not just of the law, but also a knowledge of the people

that come before their courts. He is a real classic example of a small town lawyer who has had a small town practice. He has probably got his fees paid by corporations every now and then. He has probably also received fees from the products that were produced in this little parish in Louisiana of Avoyelles Parish, where he is from. Probably he was paid in a few fruits and vegetables and maybe some of the other commodities, because many of his clients could not afford to write a check.

Tucker Melancon also has been the type of person that accepted everybody who came before him and said I need to be represented. I think that kind of human connection is particularly important for all of our judges, and certainly he brings that to this court.

I would say to my colleague Senator Cohen, you will note from his resume he has been an active Democrat, but you should not have any fear, because he has always performed those political duties with class and with style. And over all of these years, I never heard him say anything nasty or unkind about any political race that he was in of the opposition. I think that kind of spirit and affection and support for the democratic system is very, very important, and that is the kind of active Democrat that he has been.

Senator COHEN. It is pretty unusual in Louisiana? [Laughter.]

Senator BREAU. Yes, but despite that, he has been very successful. That is a good point. But we are very pleased to present him to the committee.

Ginger Berrigan is also a person I think that brings unique qualifications to this committee. She is a person who is not only well read, but well traveled, having lived in several different areas of our country, and I think that is important, because it brings a great deal of knowledge about what this country is all about.

You note that she has a degree in psychology, which is a good background for our profession, as well as being on a court I think, from the University of Wisconsin, a masters in journalism from right here in Washington at American University, and a juris doctorate from Louisiana. So I think that type of blend is important and very helpful to understanding the people and the cultures that come before the court.

She also is a member and a partner in a very prominent firm in Louisiana, the Gravel, Brady & Berrigan firm, which is well known and well respected and has produced some outstanding legal scholars for our State and practitioners.

She has also served in government, being on the Governor's Pardon Board, as well as being a part-time legislative aide at a very early age—because I see the date, Ginger—to the chairman of this committee, Joe Biden, back—I will not say when, but about the time I was coming to the Congress. So she has had experience both in State government, here in Washington, and also worked as an aide to Senator Harold Hughs, a deeply respected Senator from Iowa.

She has had a lot of community activities which the resume clearly points out, and a number of publications. This is a person who brings a real expertise to the question of criminal law and the rights and obligations and responsibilities of defendants, which is going to be so important for the remainder of this century and into the future.

So, without question, Mr. Chairman and Senator Cohen, I enthusiastically recommend both of these nominees. I would just point out that Mr. Melancon also has the entire Parish of Avoyelles in the back of me in the audience. It is a national holiday back home, and I certainly want to join in that holiday.

Senator KOHL. Thank you very much, Senator Breaux.
Mr. Jefferson.

STATEMENT OF HON. WILLIAM J. JEFFERSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Mr. JEFFERSON. Mr. Chairman and members of the committee, I am pleased to join with Senator Breaux and Senator Johnston in his absence in support of these two outstanding candidates.

I have come principally to talk about Ginger Berrigan, because she is a constituent of mine and resides in New Orleans, a place that I represent. But I want to take a moment to add my voice of support to that of Senator Breaux for Tucker Melancon, who I have known for a good long time.

Mr. Justice Holmes said something which comes to mind now, and that is that the life of the law is not logic, it is experience. A judge ought to bring a kind of breath of experience to the court, to permit him, as Senator Breaux has said, to understand the varied cultures and backgrounds and make sound decisions based on his ability to identify with the people who appear before his court.

My experience with Tucker was as a legislator when I was in the State Senate of Louisiana principally, and he worked to bring the African-American population in our State into the mainstream of the Democratic Party. His work is well regarded by all the folks in our State, but particularly by those of us who were trying to find a way to make our party more open and more cooperative and more supportive of some of the aspirations of the African-American community.

So I am proud to be a part of this nomination process and to support his nomination, as well.

Turning to Ginger Berrigan, I believe she will be an excellent addition to the Court for the Eastern District of Louisiana, and I applaud President Clinton for nominating her. Our district court has had a long list of distinguished jurists, judges such as J. Skelly Wright, Herbert Christianberry, Fred Casserby, Fred Hebee, Lansing Mitchell, and Alvin Rubin, for whom I had the pleasure of clerking years ago, just a few of the outstanding judges who served on this court. I am convinced that Ginger Berrigan will serve in the tradition of these outstanding jurists.

Mr. Chairman, I have known Ginger Berrigan for quite a few years. She has a well-earned reputation for competency and integrity in our legal community, and I feel certain that she will distinguish herself as a scholar on the bench.

But as Judge Alvin Rubin used to say so often, a judge must be more than a thinking machine, a judge must have an unswerving commitment to equal justice under the law. In this regards, Ginger Berrigan has few peers. She is a virtual champion of civil liberties and civil rights for all people. She has spent her life confronting discrimination and winning.

Along the way, she has had the grace and the charm to turn foe to friend and, at the very least, to earn the respect of her adversaries. Ginger has that rare combination of brilliance, compassion and experience that makes her unusually well-suited for the Federal court. She will do more than add diversity to the court. She will make a real difference in the dispensation of justice there.

For these reasons, I firmly urge this committee to recommend Ginger Berrigan to the full Senate for confirmation to the Federal District Court in New Orleans.

Mr. Chairman, I appreciate the opportunity to appear before you and the committee, and I would be glad to answer any questions you might have. But I think John BreauX probably covered everything that needed to be dealt with here today.

Senator KOHL. We thank you, Mr. Jefferson and Senator BreauX. They are wonderful introductions, and we will get back to you folks in just as minute.

We would now like to call Judge Judith Rogers to the stand. She has been nominated to be circuit court judge for the District of Columbia Circuit Court of Appeals.

Judge Rogers, would you raise your right hand: Do you swear that the testimony you shall give in this proceeding shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge ROGERS. I do.

TESTIMONY OF HON. JUDITH ANN WILSON ROGERS, OF WASHINGTON, DC, TO BE U.S. CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA

Senator KOHL. How would you like to introduce some members of your family to us at this time, please.

Judge ROGERS. Thank you, Mr. Chairman. I want to thank you for chairing these hearings.

My only regret is that my parents are unable to be with me today, Hazel Thomas Wilson and John Louis Wilson, Jr. They guided me and their guidance continues to help me address my task.

I am honored, however, to have with me today members of my court, members of the District of Columbia Court of Appeals, the Hon. John M. Ferren, the Hon. John M. Steadman, the Hon. John Kern, and the Hon. James A. Belson.

I would also like to acknowledge the presence of my hard-working secretary, Denise Lewis, my law clerks, and my special assistant.

Thank you, Mr. Chairman.

Senator KOHL. Thank you.

Judge Rogers, if you are confirmed as an appellate judge, at some point you may be faced with applying a Supreme Court precedent with which you do not personally agree. Would you consider yourself bound to act by such a precedent?

Judge ROGERS. Yes.

Senator KOHL. Of course, you will also be faced with cases involving issues on which the Supreme Court has not ruled. In many of those cases, however, you will have decisions from the District of Columbia Circuit on which to rely. Under what circumstances, if any, do you believe that an appellate judge should overturn precedent within his or her own circuit?

Judge ROGERS. I would be bound by the opinions of the circuit, and only in those extraordinary cases where the en banc court overruled a decision by a three-judge panel would I be in a position not to follow an outstanding decision of the circuit.

Senator KOHL. Judge Rogers, as chief judge of the District of Columbia Court of Appeals, you delivered a speech discussing civil justice reform and the problems facing the District of Columbia court system.

As you know, Congress passed the Civil Justice Reform Act in 1990. The goal of this legislation is to streamline the judicial process and to make it more accessible, affordable, and fair. In your view, what role do judges play in controlling the pace and the conduct of litigation?

Judge ROGERS. Mr. Chairman, as my speech indicated, in the District of Columbia we have taken a number of steps to ensure that judges do become actively involved in the pace and control of litigation. For example, in our trial court, which is a trial court of general jurisdiction, the chief judge of that court shifted from the former system to an individual calendar system in the civil division, so that a judge keeps the case from the beginning to the end.

In addition, case management, case tracking has been a part of the trial court and, indeed, of the appellate court as a way of making certain that the cases move according to schedule. We have spent considerable time on studies, as well, on the application of computer technology to assist the judges, as well as judicial training. And I think the type of individual calendar and case management successes in the trial court and, indeed, in the appellate court indicate that individual judges can make a real difference in the pace and conduct of litigation.

Senator KOHL. Well, what kind of steps will you take to best control your own docket?

Judge ROGERS. As an appellate judge, I have a number of procedures that I trust I will apply on the Federal court, as I have on the District of Columbia Court of Appeals. I keep a very close tab of the cases that are assigned to me and the cases that I am a member of the division. I have the assistance of a law clerk to assure that I get timely legal memoranda. I assume that those same procedures would work well on the circuit court, and I think my colleagues would attest to the fact that I am timely in producing my opinions and commenting on their's.

Senator KOHL. Judge Rogers, since the inception of the Federal Sentencing Guidelines developed by the Sentencing Commission have been the subject of debate, largely because of concerns about mandatory minimum sentences—in fact, one district court judge resigned, because, according to press accounts, he felt that the mandatory guidelines were too harsh and too rigid.

As a Federal judge, what would you do if you were faced with a situation where the sentencing guidelines called for you to impose a sentence that you felt was too harsh?

Judge ROGERS. I would be obligated to apply the guidelines, Mr. Chairman. And certainly, as an appellate judge reviewing a district court judge's application of the guidelines, I would be obliged to review his or her application, but to enforce the guidelines.

Senator KOHL. I thank you very much, Judge Rogers.

Judge ROGERS. Thank you.
 Senator KOHL. Senator Cohen.

OPENING STATEMENT OF SENATOR COHEN

Senator COHEN. Thank you, Mr. Chairman.

Judge Rogers, welcome.

Judge ROGERS. Thank you.

Senator COHEN. I would like to explore some of your ideas about the interpretation of the Constitution. I think you have decided at least six cases involving constitutional issues, three of which involved search and seizure.

One of them happened to be fairly controversial. I think it was *Cousart v. United States*, right?

Judge ROGERS. I am familiar with the case. I am not sure I agree with the characterization.

Senator COHEN. As being controversial?

Judge ROGERS. Yes.

Senator COHEN. Would you describe what the facts were of that case?

Judge ROGERS. As I recall, Senator Cohen, in that particular case a police officer observed a car traveling at 30 miles an hour. The car made a wide U-turn, then the car began going at 45 miles an hour. At that point, the police officer put his emergency lights on the hood of the car and followed the car. The car proceeded for two long blocks, which the officer testified was tantamount to about six blocks. The car stopped of its own accord. The officer had radioed for help. The officer approached the car driver, his gun holstered, asked the driver to step out, and took the driver to his car about 25 feet away.

A second police car arrived on the scene. One of the officers, with a rifle in his hand, on his knee and pointed upward, told the passenger in the car to reach for the ceiling. The trial court found, and the government did not dispute on appeal, that the passenger had been seized.

The government asked our court to extend an opinion of the U.S. Supreme Court that applied to car drivers who were stopped for traffic violations to passengers of cars. Our court declined to do that and, instead, a majority of the court decided that, contrary to the requirements of the long-standing and often reaffirmed decision of *Terry v. Ohio*, limiting the conditions under which a police officer may seize a citizen, that the subjective view of the officer and his concern for personal safety was a sufficient ground to uphold the seizure of a gun that was found in the car.

That is my recollection, Senator, of the facts.

Senator COHEN. Did you write that opinion?

Judge ROGERS. I wrote an opinion when it was before a three-judge division. The court decided to hear the case en banc. I wrote a separate dissenting opinion.

Senator COHEN. That decision was reversed on appeal, was it not?

Judge ROGERS. That is the effect of it, that is correct.

Senator COHEN. I am curious about the interpretation of it, the very sterile factual statement you just gave. What was the neighborhood like? Is that a factor that should be taken into account,

when a court is making a decision dealing with a police officer's on-the-spot type of decisions?

For example, one of our panelists this morning, in introducing Ms. Berrigan, I believe, quoted from Holmes who said the life of the law has not been logic, but that of experience. He went on to say that a page of history is worth more than a volume of logic.

One thing that many critics of our courts today seem to feel is that there is an awful lot of logic, but not a good deal of experience is being reflected by the courts' decisions in many cases.

For example, if you have a situation in which there is a high-crime neighborhood and in which there were seven police officers killed during the preceding 30 days, would that be a factor that the court should take into account in examining an officer's reasonable actions under the circumstances in wishing to search a car for a weapon?

Judge ROGERS. The issue before me as an appellate judge was to apply the decisions of the Supreme Court. The Supreme Court has decided that there are certain limitations on officers when they seize citizens. I indicated in my opinion that, of course, officers have to take reasonable steps to protect themselves from safety, protect themselves so that they are safe. Of course, they are acting on our behalf to protect all of us.

That was not the issue in the case. The issue was where the Supreme Court has set out a test, is not the appellate court obligated to faithfully apply the test enunciated by the Supreme Court, whether or not we personally agree with it. And in my view, it was our obligation and that is why I wrote my opinion as I did.

Senator COHEN. In other words, you were simply applying the doctrine of stare decisis, and that did not reflect your personal opinion in any way in terms of whether you felt the officer acted reasonably under the circumstances?

Judge ROGERS. The issue was did the officer have articulable suspicion that the passenger engaged in unusual conduct such that the officer could in his experience reasonably conclude that criminal activity was afoot. The officer never offered such testimony, the trial judge never made such findings, the officer said he took out his shotgun because he was concerned about his safety. It had nothing to do with anything the passenger had done.

Now, as an appellate court, I am obligated, where it is conceded by the Government, where the trial court has found that a citizen was seized, I am obligated, as an appellate judge, to apply the test that the Supreme Court has announced and repeatedly reaffirmed, and that is all I did.

Senator COHEN. We talk about constitutional principles. I think you would probably agree that the Constitution as written is not locked in the concrete of the original time in which it was formulated. You would agree with that, would you not? It evolves over a period of time in terms of our interpretation, as we become either more sophisticated or more morally conscious of certain practices? There is an evolutionary interpretation of what was originally defined, at least, in the Constitution. Would you agree with that general statement?

Judge ROGERS. My obligation as an appellate judge is to apply precedent. Some of the debates which I have heard and to which

I think you may be alluding are interesting, but as an appellate judge, my obligation is to apply precedent. And so the interpretations of the Constitution by the U.S. Supreme Court would be binding on me.

Senator COHEN. In the absence of precedent?

Judge ROGERS. In what context?

Senator COHEN. You are now faced with a constitutional issue or interpretation of the Constitution that the Court has not ruled on directly or has ruled on directly 50 or 60 or 100 years before. The case has not come up specifically on that point, and you are not necessarily bound by precedent in that case or it does not exist.

The question I have is do you believe that the Constitution is in fact something that is subject to interpretation in a different time and a different era? As society's attitudes change about certain mores and practices, the interpretation of those original words also change. I think you would concede that, would you not?

Judge ROGERS. When I was taking my—

Senator COHEN. Unless you are prepared to endorse Judge Bork's interpretation of the original meaning of the Constitution, which was severely criticized, because he seemed to be articulating a philosophy that existed a century or so before.

Judge ROGERS. When I was taking my master's in judicial process at the University of Virginia Law School, one of the points emphasized was the growth of our common law system based on the English common law judge system. And my opinions, I think if you look at them, reflect that where I am presented with a question of first impression, that I look to the language of whatever provision we are addressing, that I look to whatever debates are available, that I look to the interpretations by other Federal courts, that I look to the interpretations of other State courts, and it may be necessary, as well, to look at the interpretations suggested by commentators. And within that framework, which I consider to be a discipline, that I would reach a view in a case of first impression.

Senator COHEN. Do social mores play any role in your interpretation of a constitutional provision?

Judge ROGERS. I am not sure I know what you mean, Senator.

Senator COHEN. What I mean is that, as we look at civil rights, for example, over a period of time, we have expanded civil rights in this country, and I think justifiably so. We have expanded interpretations of provisions of search and seizure over a period of time. As we have become more sophisticated, our interpretation of the Constitution has changed. Justice Holmes or one of his predecessors might have interpreted the specific language of the Constitution differently.

The question I am really asking is: What happens when we go the other way? What happens when a society is so overwhelmed with fear of crime that they decide that sterner actions have to be taken? Take for example, stop and frisk laws. I assume you might have some problems with that particular policy in the practice of certain police. I notice that Virginia just this year started the practice of setting up roadblocks during holiday periods, during Christmas and New Year's Eve, to stop vehicles to check them for the driver's sobriety.

So we are seeing concern about what is taking place in society, and I am asking you whether or not that should or would have any influence on your particular interpretation of the Constitution.

Judge ROGERS. As an appellate judge, I have been faced with a roadblock case, and I relied on Supreme Court decisions as to what is the proper scope for a roadblock. I would do the same type of thing with other issues. That is my role as an appellate judge, to apply precedent and look for the closest analogy I can find.

Senator COHEN. A couple more questions. What is your opinion about the minimum mandatory sentencing provisions that Congress enacts? Senator Kohl asked you about this. What is your feeling, as a judge, as to their utility?

Judge ROGERS. I am aware, Senator, of some of the debate on the pros and cons, and certainly before I was a judge I was engaged in comment on them. But as a judge, I have been dealing with them strictly from the point of view of legal challenges to them. I have sat on a case where a mandatory minimum sentence was challenged, and we upheld it.

Senator COHEN. What I am asking you is not whether you think they are constitutional or should be upheld, but from your point of view as a judge, what is their effectiveness? There is a good deal of controversy right now in terms of the mandatory guidelines that were adopted back in the early 1980's to minimize judicial discretion in the imposition of sentences. Now we have Federal mandatory sentencing provisions, and some argue that they are now in conflict and we are back to a chaotic situation. I am wondering, not about your interpretation of their constitutionality, but your feeling about their effectiveness, as a judge.

Judge ROGERS. Well, as a judge, I have not been exposed to the Federal sentencing guidelines. We do not have such guidelines in the District of Columbia. We do have mandatory minimum sentences and I have enforced them, as I mentioned, when the issue has arisen.

Senator COHEN. One final question: In the State of the Union Message this week, President Clinton supported a provision which is now commonly known as three strikes you are out, or actually three strikes and you are in. What is your reaction to such a proposal? Is that something you would favor?

Judge ROGERS. As an appellate judge, my obligation is to enforce the laws that the Congress passes or, where I am now, that the District of Columbia Council passes.

Senator COHEN. Assuming it is constitutional?

Judge ROGERS. Assuming it is constitutional.

Senator COHEN. I think that is all I have right now.

Senator KOHL. Thank you very much, Senator Cohen.

Thank you much, Judge Rogers.

Judge ROGERS. Thank you, Mr. Chairman.

Senator KOHL. We would like now to call Judge Michael Ponsor to the stand. Judge Ponsor has been nominated to be district judge for the District of Massachusetts. Would you please raise your right hand: Do you swear that the testimony that you shall give in this proceeding shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge PONSOR. I do.

TESTIMONY OF HON. MICHAEL A. PONSOR, OF MASSACHUSETTS, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF MASSACHUSETTS

Senator KOHL. Thank you very much, Judge Ponsor.

If you have members of your family here, we would love to meet them.

Judge PONSOR. I do. I am proud to have my mother Yvonne Ponsor here with me this afternoon, and my sister, Valerie Pritcher. My father Ward Ponsor is not able to be here, but he is here in spirit. And my three children, my oldest Christian is in California and is unable to be here, and my two little ones, Ann and Joseph, who are 10 and 8, unfortunately are back in Massachusetts with the flu. Otherwise, they would be here, as well.

Senator KOHL. Very good.

Judge Ponsor, you have been a magistrate for a number of years now. What do you perceive to be the primary differences between your current position and a position as a Federal district court judge?

Judge PONSOR. I think there are probably two primary differences that I will be facing. One will be the increased caseload and responsibilities of the U.S. district court judge, and the other will be the responsibility for the conduct of felony jury trials, of which a magistrate judge is not permitted to conduct. I have conducted misdemeanor trials and a large number of civil trials, but I have not sat on a felony jury trial, and I think that will be a difference.

Senator KOHL. Well, what areas of the law do you think you will need to study up on to get up to speed, should you be confirmed for this position?

Judge PONSOR. Well, I feel fortunate, because, as a magistrate judge in a single-judge court in our rural area of Massachusetts, I have handled many of the responsibilities of district court judges already. The one area where I believe that I will need to look forward to help from the Federal Judicial Center and from my colleagues on the court will be in the area of presiding over felony jury trials, and I think that would be the main area of getting up to speed.

I will also be responsible for handling bankruptcy appeals, as a district court judge, which was not part of my work as a magistrate judge, and I think that is another area where I will be putting in some particularly hard work to get myself ready.

Senator KOHL. Judge Ponsor, your response to the committee questionnaire indicates that throughout your career you have been committed to the rights of the mentally ill. From your experience, what have you learned about the problems facing lawyers dealing with the issues that affect the mentally ill?

Judge PONSOR. Well, I think there are probably a couple of areas. One is the separate area of actual legal rights, which can be very complex, and that has to do with what sorts of procedural protections may be afforded to people who are suffering from mental illness, and what the court's responsibilities are.

There is a second aspect to it, and that has to do with community acceptance, how much can we ask of our communities, how much can we properly ask of our communities, and I believe that is an-

other area where work needs to be done by advocates on behalf of the mentally ill, and people really need to have a dialog about what is really best for people who suffer from these disabilities and what is best for the community.

Senator KOHL. What can Congress do, in your opinion, to assist in assuring that the mentally ill get adequate legal representation?

Judge PONSOR. Well, I think probably the primary thing is to make sure that the judges who come before you are sensitive to the problems, and make sure there is sufficient funding for such organizations as the Legal Services Corporation, so that they will be able to assist problems. As you know, this population is largely indigent, and they suffer from a lot of the difficulties that indigent people suffer from generally, and I think probably those two areas would be the primary ones that come to mind for me.

Senator KOHL. Judge, you will probably be faced with cases involving issues on which the first circuit has not ruled. How will you approach cases on which the circuit has not ruled, and for which there is no precedent?

Judge PONSOR. Well, if it has to do with statutory construction, I would begin by looking carefully at the statute and at the legislative history of the statute. If it does not involve actual statutory construction, then I will try to look at other districts or other circuits which might have had cases in the area, although my own circuit or district might not have handed down any decisions.

If I can't find any parallel decisions from other districts or other circuits, I will try to find analogous situations and reason by analogy. If I cannot find that, then I am going to have to go back to basic principles and try to remember that what we are ultimately trying to do as judges is do something which is fair.

Senator COHEN. Why are you interested in this appointment?

Judge PONSOR. Well, I spent my whole life and have found my life enriched from the time I was an undergraduate in high school in public service, and I seem to have a bent for this kind of work which permits me to contribute something to my community.

I love western Massachusetts. I love the people of western Massachusetts, and this seems to be the best way that I can give something back for the enormous privileges that I have enjoyed in my life, and I really look forward to doing that.

Senator KOHL. Very good. Thank you very much.

Senator Cohen.

Senator COHEN. Protocol does not permit you to ask us the same question, I might point out. [Laughter.]

Let me follow up with just a couple of questions. You mentioned that in trying to arrive at an appropriate decision, you would look, among other things, at legislative history. What do you look for in legislative history? I am saying this by way of a caution to you. You are aware that Justice Scalia does not hold a very high opinion of legislative history and, as a matter of fact, he maintains it is a figment of our imagination. I would be interested in hearing what you would look for in the way of legislative history.

Judge PONSOR. I agree that one has to be careful and sensitive, when you are getting into legislative history, and one hopes, of course, that the statute is clear on its face and you do not have to get into it.

But I do find that it is sometimes helpful to look at the congressional debates or the committee reports that describe a particular piece of legislation, and that that is sometimes helpful. That is where I go, to the Congressional Record, when I am looking at—

Senator COHEN. Do you place more emphasis on what a committee chairman or ranking member says than you would upon some nonmember of the committee? Because, as you know, a great deal of debate takes place on the floor, but following the debate, members insert extensive materials that are not uttered on the floor, but are simply inserted for the record, which may lead you down a labyrinth course to a dead end. So do you place any priorities in terms of who you would look to in the way of trying to determine what Congress really intended?

Judge PONSOR. To be honest, I try to look at the whole record, and where it is so muddy that I cannot draw a real conclusion from it, then I just have to go elsewhere. But it is remarkable to me that there often is unanimity about a particular intent, and when you can find that, I think it is very helpful.

Senator COHEN. The October 1993 issue of the Massachusetts Lawyer Weekly reported your decision in the *FDIC v. Huntington Bank Corporation*, and the quote was that it underscores the effectiveness of the D'Oench Duhme doctrine in collection actions by the Federal Deposit Insurance Corp. and its successors in interest. In other words only those agreements in writing as authorized by the board of directors of a particular bank will be regarded as being enforceable. Obviously, every one of us has an interest in seeing to it that the FDIC and RTC in fact have this tool at their disposal in order to protect the public's interest.

The question I have is, what about situations where you have small vendors? You might have a plumber or a window washer, and they do not have enforceable agreements and they are precluded under the D'Oench Duhme doctrine from bringing lawsuits. Do you see any injustice in that particular case, where you have the small vendors who do not operate on that basis?

Judge PONSOR. I believe there is a potential for injustice. The D'Oench Duhme doctrine in section 1823 is one of those two-handed arguments. On the one hand, you want the FISC to be protected, you want the FDIC to be protected from the effect of secret side agreements.

On the other hand, there is a very real potential for unfairness. The *Huntington* case for me, fortunately, fell right in the heartland of D'Oench Duhme. It wasn't a supplier. It was a situation where there was a promissory note, and so on, and I felt bound by the 50-year-old Supreme Court precedent and Congress' statute. But I can foresee situations where the D'Oench Duhme doctrine may conceivably be overused, and I think we need to be sensitive to it.

Senator COHEN. I am glad to hear that. I introduced a bill to try to correct that, as a matter of fact, just so we take into account the little folks who do not have the advantage of having written contracts.

One final question: Your experience has been rather limited in the field of criminal trials. I suspect that you are going to have an increased workload in that regard. What are you going to be doing

to get yourself in a position to be able to decide these kinds of cases, which may amount to a flood tide in the coming years?

Judge PONSOR. I have two things in my background which will help me. One was that I was a criminal defense attorney when I was in private practice, and I tried felony cases in Federal court as a practitioner.

Second, as a magistrate judge, I have presided over a number of evidentiary hearings involving motions to dismiss and have dealt with all of the preliminary matters right up to trial as part of my responsibilities as a magistrate judge. So I think that will give me a leg up, so to speak. Then, second, as I said before, in fact this Monday I am going to Richmond to begin a week of hard work preparing for what I hope will be my new responsibilities. I think that and the assistance of other judges will give me all the hope that I will need to get ready.

Senator COHEN. As I understand it, you were appointed to an advisory group in Massachusetts, Federal District Court, Civil Justice Reform Committee—

Judge PONSOR. Yes, sir.

Senator COHEN [continuing]. Which made recommendations about implementing the Civil Justice Reform Act of 1990, that Senator Kohl mentioned?

Judge PONSOR. Yes.

Senator COHEN. I think the Massachusetts group went quite far in terms of what it recommended. The question is what recommendation do you have in terms of trying to reform the rules?

Judge PONSOR. I think, first of all, you need very close case management. When I was appointed in 1984 a magistrate judge in Springfield, we had over 800 pending civil cases. I am happy to say that we now have approximately 330 pending civil cases, and I think part of the explanation for that reduction is in very close case management by the judge. I am a hands-on judge. I am setting schedules, I am assisting in settlement all the time. I think that is very important.

I think our new local rules which were enacted pursuant to the Civil Justice Reform Act and the changes that have recently come into effect in the Federal Rules of Civil Procedure will make discovery a lot faster and a lot cheaper for a lot of litigants, and I think that is something that judges should rightly have on their mind. We need to move our civil cases along and we need to try to move them along in a way which reduces expense, so that our Federal courts remain open to little people, ordinary people, as well as large corporations.

Senator COHEN. That is all I have, Mr. Chairman.

Senator KOHL. Thank you very much, Senator Cohen.

Thank you very much, Judge Ponsor. You are excused.

Judge PONSOR. Thank you.

Senator KOHL. I am going to be leaving this hearing right now. I have enjoyed being here, and I wish all the nominees the very best of luck and good fortune.

Senator Metzenbaum is going to be sitting in my stead. Senator Metzenbaum.

Senator METZENBAUM [presiding]. Our next nominee is Leslie Brooks Wells.

Ms. Wells, do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Judge WELLS. I do.

TESTIMONY OF HON. LESLEY BROOKS WELLS, OF OHIO, TO BE U.S. DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF OHIO

Senator METZENBAUM. Would you like to introduce your family and perhaps the Campbells, as well, and anybody else that is with you?

Judge WELLS. Thank you very much.

I think you met my daughters, Kristin Brooks of Cleveland, OH, and Caryn Brooks of Berkeley, CA, representing Lauren, my daughter, and Stan Miller, and my grandchildren, Storm and Tenaya Miller of Mt. Shasta, CA, as well as my son, Tom Brooks and his wife, Francesca, and my grandson Riccardo of Lugano, Switzerland.

Also my brother and sister-in-law, Fred and Adrienne Brooks of The Plains, VA, and my cousins, Jim and George Anna Hilton of Salisbury, MD, are here with me.

My bailiff, Rob Pacsi, and Tom and Peg Campbell are here from Cleveland, OH, Madelaine Fletcher of Baltimore, MD, Bob Fenton of Alexandria, VA, and Wendy Leatherberry of Washington, DC.

Senator METZENBAUM. Let me ask your daughters to stand.

Judge WELLS. Again, Caryn and Kristin.

Senator METZENBAUM. We are happy to welcome all of them and happy to welcome you.

Judge WELLS. Thank you, sir.

Senator METZENBAUM. Do you have a brief opening statement that you would care to make?

Judge WELLS. No. Thank you very much.

Senator METZENBAUM. Judge Wells, Congress is contemplating legislation aimed at reducing the overcrowding in Federal courts, by allowing Federal judges to assign some of their smaller cases to court-appointed arbitrators. Some people have expressed concerns about this approach, saying that it infringes upon the rights of citizens to a jury trial.

On your questionnaire, you listed the case of *Essef Corporation v. Mordecki Driori* as one of your most significant opinions. That case involved the confirmation of an award made by the American Arbitration Association in a matter concerning a patent license disagreement. Given your experience both as a judge and a litigator, what are your thoughts on the proposal to use court-appointed arbitrators?

Judge WELLS. Certainly, as we have seen many, many attempts at trying to find alternatives for people to resolve their disputes, arbitration is one of the time-honored ones and has great value. I particularly find when it is contracted for by the parties in advance, that it is a wonderful assistance to having people anticipate how their problems will be resolved in a swift way.

On the other hand, the right to be able to proceed in court is a very important right, and we have been able—and I think our district in the northern district has set some wonderful standards—to use early dispute resolution, mediation, types of arbitration, and summary jury trials as efforts to give people, once they are at the

courthouse door, an option to proceed. But it still preserves for people who feel that they need their day in court the opportunity to go forward.

All I can say is that I am pleased to be moving to a bench hopefully that has the full facilities to offer these options. They are important in a time like this.

Senator METZENBAUM. But it would always be optional with the litigants?

Judge WELLS. But they are optional with the litigants, and I think many people take advantage of them. It is sort of as if trial has become to a client, as somebody has said, sort of like surgery would be to a patient. It can be very important, but it is not the only way to resolve disputes, and in America we need to make available as many as possible.

Senator METZENBAUM. In recent years, much has been said about Federal courts' increased caseload generally and the resulting problem of docket backlogs. If confirmed, what steps, if any, would you take to ensure that your docket progresses at as quick a pace as is fair and reasonable?

Judge WELLS. I am fortunate in some respects to anticipate being able to follow a judge who went over several years ago from the bench I am on, which is one of the busiest in the country, really, and so we try very hard, but with extraordinarily limited resources to do lots of things that manage the docket.

The closest thing I know to say, as a trial judge, is you stay on top of it. Everybody who works with you in your courtroom stays on top of that docket, and you in an early point in any case have an opportunity—I do it personally, rather than through surrogates or law clerks—to sit down with the lawyers, so that you can get a good feel for what direction a case needs to go, and that has proved useful. I think I will be able to apply those things, but couple them with a system which is much more prepared to accept—as our district court system is, and I think with some of the reforms that have come along, it is particularly so—prepared to accept the substantial increase in dockets.

Senator METZENBAUM. Some Senators, as well as some commentators, have criticized judicial opinions that they label the work of judicial activists. These critics recognize the importance of stare decisis, judicial precedent, and sometimes these two goals, to avoid what some may call legislating from the bench and to follow settled law, may conflict. Do you have any thoughts on the importance of stare decisis and the need to follow settled law?

Judge WELLS. We do follow it. I have been a judge 11 years. I sit in a State where I am constrained to follow the law, and I have done that. That is our primary obligation, is to follow the law.

Senator METZENBAUM. Do you think at times a judge has a case before him or her and it cries out for a specific kind of a conclusion, and yet, based upon stare decisis, the decision would fall the other way? What does a judge do then?

Judge WELLS. Well, it is one of the great challenges of being a judge, is that you understand your primary obligation, and it may be that you feel as the case develops that there might be some other way to go. But it is a fairly common occurrence that one has

to look seriously at being constrained by the law. Yes, we are constrained by the law.

That is different I think in your question than the unprovided case, where you get a situation where there has never been anything you can lean on. I think what you are suggesting is something different. And certainly there was a period in this country where there was a great expansion in what people wanted to do, but it is not my judicial philosophy.

Senator METZENBAUM. Senator Cohen.

Senator COHEN. Thank you very much.

Judge Wells, I do not profess to understand Louisiana politics, and even perhaps less Ohio politics. But I was curious, do you have an election system in—

Judge WELLS. We have a very vigorous election system, very vigorous for the judges. I sit in a county where 20 of us will be up for election this term, and there are legions of people who run. There is no incumbency rule. I have gone through many elections.

Senator COHEN. We do not have such a system in Maine, except for probate judges. When you run, how do you run a campaign for the court? Do you base it on your record? You have had an outstanding record. I think 7 of your opinions out of 147 were appealed, a pretty outstanding record, I would think. What do you run on?

Judge WELLS. I think 7 were reversed out of 147 appealed or something. It is a very challenging thing to do and you run it very close and tight and with good advisors. Actually, we formed committees who do much of it. But it is a good question.

Senator COHEN. Not the mechanics of running, but the basis—

Judge WELLS. Well, we cannot say anything really except judge us on our record. Yet, let me say this: I know it is a highly criticized system, but it is one I have been in for a long time. It does do something that overcomes the isolation that judges commonly feel. When I go into the community, which I do on many occasions, I am a lightening rod for all of their concerns about the justice system.

Of course, I cannot do anything about those concerns except direct them to the people who can. But it does mean that the courts feel to the people as if they are their courts, and I think that is something that you could lose in an isolated position where judges were kept away from people. But you are correct, it is an awkward campaign. There are many, many decisions one makes as a judge not to do things that others urge you to do, because you are a judge.

Senator COHEN. In other words, you do not go out on the campaign stump and say I am for law and order or I am for greater police protection. What do you do?

Judge WELLS. No, we are governed by the canons. We are governed by the canons, and our canons in our State follow the model of the canons here, with the exception that they recognize that we are in a State with partisan primary races for judges who must run flat-out open each time. There is no retention. So it is challenging.

Senator COHEN. And somebody running against you, do they hold up your written opinions?

Judge WELLS. Sometimes they just go on television and show slamming jail door cells or something and put their name across the screen. You know, it can get very down and dirty. [Laughter.]

Senator COHEN. You have a State in which you have two Democratic Senators, and we had a Democratic President elected in 1992. I was wondering whether or not you got caught up in the politics of that somehow. As I understand, you ran for the supreme court?

Judge WELLS. I ran in the contested primary on the Democratic ticket for the supreme court, and I was the endorsed Democrat in that race. I lost it, but very narrowly.

Senator COHEN. Do you have a judgment as to why? What were the issues? Was it something about your record?

Judge WELLS. Talk to your colleague sometimes and maybe he has more insight than I do. No, it was not about my record. But I ran a very constrained campaign, as I feel is proper. So no television maybe would be part of your answer.

Senator COHEN. Senator Metzenbaum raised the issue about applying stare decisis, and what you would do in the absence of some applicable case right on point. I was trying to explore with Judge Rogers earlier the situation in which we want our judges to be insulated and protected against public opinion. That is the reason why we are protected by life tenure.

But do you draw a distinction between public opinion and what Holmes might call the "felt necessities" of the time? In other words, in your own mind, are you able to distinguish, or is there a distinction between what is taking place currently as far as public opinion, and what you might determine to be something so compelling in the way in which society is drifting, whether left or right, that you would feel compelled to respond to that?

I am not arguing one way or the other whether you should be more to the right or the left, but obviously there is a political swirl taking place in our society, and always has and always will. What is your opinion about a situation in which you do not have a precedent and you are free to exercise some judgment in this particular field.

Do you take into account what the people are thinking? Is that something that should be dismissed out of hand, as someone who has run for reelection as a judge? Do you listen to what they are saying, or do you say, wait a minute, I cannot listen in this case, I know there is a problem out there, I know there is violence—I know all of this, but I am taking a very academic approach and I am insulated against the felt necessity of the time?

Judge WELLS. Fortunately, I am a trial judge, and so I would say do I let that influence me? No, I cannot. I am not permitted to do that under my oath. I follow the law and I follow it as it comes to me.

Senator COHEN. The law is unclear.

Judge WELLS. When the law is unclear, then it is a different inquiry. I do not take that line of inquiry. When there is a case where the law is cloudy, then one tries to clarify it. If there is a case where there is no provision in the law—and that happens occasionally, which I call the unprovided case—then that is a little bit of a different analysis.

But it comes down to the same thing. We have very narrow responsibilities. Find the intent, if it is not clear on its face. If it is clear on its face, that is the intent, whether there has been another case in the court of appeals or not. If it is not and it is a generalization, then one tries very hard to understand what the legislative intent was, and I think we have had some discussion about ways of doing that. But one looks for parallels, if it is not a question of a statute.

Senator COHEN. I am not even talking about legislative intent. You have a factual situation in which you are a trier of fact now.

Judge WELLS. All right.

Senator COHEN. You are looking at the actions of a police officer under a certain set of circumstances and you listen to the entire presentation of facts, that the police officer is in a very dangerous area with lots of shootings of police officers in recent times. Do you take into account their actions within the context of the world in which they have to function?

Judge WELLS. Senator, this is my daily bread. I am a very busy felony court. As I understand the law in my jurisdiction, no.

Senator COHEN. You do not take that into account?

Judge WELLS. No, not what you are describing.

Senator COHEN. You participated in the Ohio Supreme Court and the Ohio Bar Association Task Force on Gender Fairness?

Judge WELLS. I did.

Senator COHEN. The Senate last year passed the Violence Against Women Act, sponsored by Senator Biden and cosponsored by a number of us on the committee, and one of the titles of the bill is the Equal Justice for Women in the Courts. It was in response to a number of task force reports that we had on widespread gender bias in the courts, particularly in the case of rape and domestic violence. We would provide funds for education and training programs for Federal judges and court personnel.

I would like the benefit of your own experience in terms of dealing with the courts. Is there gender bias, in your judgment, in rape cases and domestic abuse cases? If so, should we spend the kind of money that we are about to authorize for training judges and court personnel in dealing with it?

Judge WELLS. I have been privileged to be part of some of the training as a subject. I mean I have gone to sessions. In Ohio, we train our judges in gender bias. I think it is helpful.

Senator COHEN. You would recommend that we continue to fund it?

Judge WELLS. I think people basically just need to hang all their biases at the door when they walk in a court room, and I think that holds for all the staff in the justice system, from the person who types something in an order to the person who is the judge.

Senator COHEN. That is all I have. Thank you very much, Judge Wells.

Senator METZENBAUM. Thank you very much, Senator Cohen.

Thank you very much, Judge. We will see if we cannot move your confirmation process along.

Judge WELLS. Thank you.

Senator METZENBAUM. Our next nominee is Marjorie Rendell. Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Ms. RENDELL. I do.

**TESTIMONY OF MARJORIE RENDELL, OF PENNSYLVANIA, TO
BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF
PENNSYLVANIA**

Senator METZENBAUM. Ms. Rendell, do you have any opening statement you would care to make?

Ms. RENDELL. No, I do not, Mr. Chairman, other than the fact that I am privileged and honored and very pleased to be here.

Senator METZENBAUM. We are happy to have you with us.

Do you have members of your family and friends here, and would you like to introduce them?

Ms. RENDELL. Yes, Mr. Chairman, I would like to. I believe you already met my son Jesse who is here. My husband Ed is expected any minute. He had to go to a conference that is being held in Washington, so he will be here shortly, I am sure.

My cousins, the Ramseys, Lisa, Jean and Jill are here, as is a law clerk in waiting, Dan Gruen, who is a lawyer here in the District who hopefully in several weeks would be helping me on the bench.

I would like to note the absence of my father who is in North Carolina; my sister who, but for the weather, would have been here from North Carolina; Beth Cummings; and my mother who passed away, as a matter of fact, the day that I was nominated for this position, but she is here in spirit.

Thank you, Mr. Chairman.

Senator METZENBAUM. Your son is how old?

Ms. RENDELL. He is going to be 14 in March.

Senator METZENBAUM. Stand up, please, young man. What is your name?

Ms. RENDELL. His name is Jesse.

Senator METZENBAUM. Do you think your mother will be a fair judge?

Senator COHEN. Wait a minute, is he under oath here? [Laughter.]

Senator METZENBAUM. Then I think we will move forward with the confirmation process.

Ms. RENDELL. I guess he will get that Genesis game after all. [Laughter.]

Senator METZENBAUM. Your questionnaire indicates you engage in many public service activities, such as the Visiting Nurses Association and the mentoring and counseling of college students. Given your experience, do you think that there should be a mandatory requirement that lawyers must engage in pro bono activities, or do you believe the voluntary system works at present?

Ms. RENDELL. Mr. Chairman, I believe you cannot force people to do good, and I believe that mandatory requirement of pro bono activities does not get to the heart of the matter. I believe that our pro bono service should be on a voluntary basis, but at the same time I believe that the legal profession should encourage voluntary service and, therefore, I am in favor of the ABA's recent resolution

that makes an aspirational goal for each lawyer of 50 hours per year of pro bono service. So I believe that our profession has responsibility to encourage the voluntary pro bono service.

Senator METZENBAUM. You have been in practice most of your career, and most of your experience I note has been in bankruptcy law. If confirmed, you will be faced with a docket of criminal, as well as civil matters, including constitutional, employment, and civil rights issues. Given your background, pretty much in bankruptcy, what steps do you plan to take to familiarize yourself with those areas of law in which you do not have that much experience?

Ms. RENDELL. I am taking advantage even at this time of the resources of the Federal Judicial Center and am reading up on different areas, especially the criminal area where I really have no exposure. I will be going to judge school next week, as well, and plan to do a lot of reading in that area and other areas, as well.

We also have a wonderful bench in the Eastern District of Pennsylvania, and my hopefully soon-to-be colleagues, many of them have offered assistance and I have already started talking to some of them and also to some of my colleagues. In fact, one of my partners, Michael Beilson, who was U.S. attorney in the eastern district, to try to get up to speed. It will be a challenge, it will be a learning experience, but I believe I am ready for that challenge and looking forward to it.

Senator METZENBAUM. With your experience in bankruptcy, this does not necessarily come under your jurisdiction as a Federal judge, but this Senator has long had the feeling that there was kind of in-breeding in the bankruptcy courts where the lawyer for the trustee and the lawyer for the creditors and the lawyer for the bankrupt, they just move around back and forth and one hand washes the other, and nobody worries too much about preserving the assets. Do you have any thoughts on that subject?

Ms. RENDELL. Yes, Mr. Chairman. Prior to the 1978 Bankruptcy Code, the Bankruptcy Act which had been in force since 1933 really left us open as a system to that kind of criticism, and it was perhaps the case.

But with the advent of the 1978 code, different specific responsibilities have been given to different parties, and I think that we are doing much better and that this tarnished reputation should not continue. However, at the same time, we have not had effective tools within the bankruptcy system for case management, that is moving cases along on a fast or at least appropriate track, so that the backroom dealing or the discussions among the various parties are the way that things have moved.

But I will say that with the Senate bill now pending, we hopefully will be given case management tools such as the presumption of the filing of a plan within 1 year for every case, such as a new fast-track chapter 10 proceeding, whereby small cases move forward. I think the diligent time advancing of cases and the judge's monitoring of those cases will help do away with a lot of the, as I say, tarnished reputation or cronyism that I think has been associated with the bankruptcy system in the past.

Senator METZENBAUM. Thank you.

Senator Cohen?

Senator COHEN. Just a couple of quick questions on bankruptcy. Are there too many priorities set forth in the law as far as preferences under the Bankruptcy Act, so that by the time you get through all the priority creditors, there is nothing left over for any of the unsecured creditors?

Ms. RENDELL. That is an interesting question, and I am wondering if legislation has been thought of to do away with some of them. I cannot think of any of the priority claims that really should not be there. I understand that some might have reluctance because of the trickle-down theory, and if there is nothing there, it is not right for creditors.

Yet we have very good priorities. We have priorities for taxes, we have priorities for ERISA claims, we have priorities for costs and expenses of administration, which must be borne or there definitely will be nothing there for trade creditors.

So while you might criticize that, because that is what has happened, I believe the legislature would be hard-pressed to whittle away on any of those or limit them, because I believe that maybe could do more disservice to trade creditors in the end.

Senator COHEN. What about the effectiveness of chapter 11, has it served a valid social goal?

Ms. RENDELL. There has been a lot of commentary in the last 18 months about chapter 11 and that it has not served a goal. Again, I would say exactly as I said to the chairman, that the goal of chapter 11 should be to come out of chapter 11. It should not be to linger. And to the extent that a judge in a given case or the attorneys in a given case let it linger, then they are doing a disservice to chapter 11.

So I believe that with the passage of S. 540, that we will have tools that will move it along, and I think will make a lot of the commentators think twice about just abandoning this as a system. I do not think there is anything wrong with the system that we working diligently and working through effective case management cannot overcome.

Senator COHEN. That is all I have, Mr. Chairman.

Senator METZENBAUM. Thank you very much, Senator Cohen.

Senator SPECTER.

Senator SPECTER. How do you like being a witness?

Ms. RENDELL. Actually, being a witness is a lot better than anticipating being a witness, Senator. [Laughter.]

Senator SPECTER. Your answers are very good, Ms. Rendell, and I do not have any questions for you, because, as I said earlier, I have known you a long while and have total confidence in your ability to handle the job.

I would make one comment that I heard Senator Thurmond make in 1982, at one of the first Judiciary Committee hearings I attended, where there were two judicial nominees from Pennsylvania testifying. Senator Thurmond asked the question: Do you promise to be courteous, if you are confirmed? And I thought to myself, what kind of a question is that? Who would not answer that in the affirmative?

Of course, both nominees answered it in the affirmative, and then Senator Thurmond said, the more power a person has, the more courteous that person should be.

Senator COHEN. Speak into that machine there, will you? [Laughter.]

Senator SPECTER. You mean pull it closer?

Senator COHEN. Senator Thurmond always admonishes us to speak into the machine.

Senator SPECTER. Among other things. [Laughter.]

I am in my 14th year now here and I have not heard anything wiser than that said in the time I have been here. I believe there is a problem with judges, maybe even with Senators, perhaps less so with Senators who have to run for election. Although there is some consideration to limit Federal judicial positions to 6-year terms and give Senators life tenure. [Laughter.]

But there is a real problem with judges having life tenure not to remember what it was like not being a judge, and I think that is something that has to be remembered. There have been a great many judges appointed, about 30 in Pennsylvania since I have been in the Senate, and I have to say that I get some complaints about some of those. So I always want to make Senator Thurmond's point.

Ms. RENDELL. I could not agree more with that. I think self-respect for the individual, understanding the traumas that the lawyers, the litigants, and the jury is going through and empathizing with them, and not engaging in belittling, that to me is so fundamental to our system. And I think that the concept of life tenure should instead be that you have security in order to accomplish something while you are there, not security that would make you feel self-important. So I feel that those words are well spoken, and I hope and believe I can carry them out.

Senator SPECTER. I appreciate that response, and I think that is the essence of life tenure: to give independence so you can carry on your role as a judge. I look forward to seeing you do just that.

Ms. RENDELL. Thank you so much, Senator.

Senator SPECTER. Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you very much.

Ms. RENDELL. Thank you, Mr. Chairman. Senator Cohen, thank you.

Senator METZENBAUM. Mr. Thomas Vanaskie: Mr. Vanaskie, do you swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Mr. VANASKIE. I do.

TESTIMONY OF THOMAS VANASKIE, OF PENNSYLVANIA, TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Senator METZENBAUM. Would you like to introduce your family, Mr. Vanaskie?

Mr. VANASKIE. Yes, I would, Mr. Chairman. Thank you very much.

I only brought a pad with me, because I did not want to forget anybody. I have with me and have already been introduced to you the rock of my life, my wife Dottie, and my children, Diane who is 14, Mark who is 12, and my son Tommy who is a little over-awed by the whole process. He is 10 years old.

I am proud to be here, sir, to introduce my parents: My father, who is a Pearl Harbor survivor, and my mother, John Vanaskie and Dolores Vanaskie. And I have here my mother-in-law and father-in-law, Bob and Edith Williams; my brother-in-law and sister-in-law, Bobby and Marsha Williams are here with their nephew Scott, who is a senior in high school. My very, very dear friends from home, the Helbachs, Karen and Mike and their children Jill and Mike, Jr., are here, as well.

My colleague in practice in Scranton, Tommy Brown is here, and my colleague in practice in Washington, Joe Artebean had been here. And also I am really pleased that two very distinguished attorneys from the District of Columbia who I have practiced with on some difficult matters have stopped over, Dave Eisenstadt and Dan Joseph.

Senator METZENBAUM. Do any of you think that Mr. Vanaskie will not be a fair judge, if confirmed? If you do, you had better leave the room promptly. [Laughter.]

Mr. Vanaskie, would you care to make an opening statement?

Mr. VANASKIE. I do not have any opening statement, Mr. Chairman, other than to express my gratitude to the President for the confidence he has expressed in me in nominating me for this position of tremendous responsibility, to express my thanks to Senator Specter and Senator Wofford for their kind words of support they offered today, and to commend the committee and its staff for bringing this nomination to a hearing so promptly after the recess.

Senator METZENBAUM. Mr. Vanaskie, I heard Senator Wofford spell out some of your background, and some of it passed over me. Would you just give me a little bit of a résumé on that?

Mr. VANASKIE. Mr. Chairman, I grew up and I have four brothers and two sisters. It was a large family in a very, very small house, half-double, in a little coal mining town called Schmoken. My dad is a bricklayer and, as a bricklayer, especially in that area, it was seasonal employment and it was tough going. My mother worked in a shirt factory.

And at an early age, we had to work and I have worked since I can remember. I have worked, of course, as a paper boy and then in the circulation department of a newspaper, I have flipped hamburgers, I have washed dishes, I have worked in a hat factory, I have worked in a shirt factory, in a warehouse, I worked as a construction laborer. I think the hardest job I ever had was planting trees in strip-mine reclamation projects. It does not sound like hard work, but digging in rock and planting trees in rock is very hard work.

I have also had great experiences both in law school and being able to clerk as a first-year law school student for Judge Genevieve Blatt, who was on the commonwealth court, a very distinguished member of our commonwealth court, which is an intermediate appellate in our State. And I have worked in a State agency and I have worked for a Republican State Senator in Pennsylvania, as well, while I was in law school.

Senator METZENBAUM. A very interesting background, and it certainly gives you a broad base from which to become a jurist.

Your questionnaire states that since 1985, 100 percent of your practice has been civil litigation. If confirmed for a position on the

Federal bench, you will preside over cases which may include drug trafficking, major Federal and civil rights violations, and constitutional issues. That is a little bit different from civil litigation, and my question is do you have any steps that you plan to take in order to familiarize yourself with those areas of the law on which you may lack experience?

Mr. VANASKIE. Yes, Mr. Chairman, I do have plans, and in hopeful anticipation that I am confirmed, I have already begun the effort to bring myself up to speed in those areas. For example, I have already attended a seminar put on by the U.S. Sentencing Commission with respect to the guidelines. I have obtained from the Federal Judicial Center educational materials that are very, very useful, including video training materials. As the other nominees who are here today, I am enrolled next week to go to video orientation for district court judges.

I have a very good rapport with the members of the Middle District of Pennsylvania now, and I intend to enlist their advice and help in coming up to speed in this area. I should mention that, in terms of civil rights, I have had experience in that area as a litigator and have represented an indigent State court prisoner in bringing an appeal to the U.S. Court of Appeals for the Third Circuit that raised constitutional rights.

Senator METZENBAUM. In 1992, you were appointed to the Lawyers Advisory Committee for the U.S. District Court for the Middle District of Pennsylvania. Please explain what issues that committee addressed, and whether your experience has provided you with any insights concerning the challenges that a U.S. district judge may face.

Mr. VANASKIE. The advisory committee for the middle district has been in place for a great number of years. It predates, of course, the Civil Justice Reform Act, but its intent was to serve as a liaison between the practicing members of the bar and the court itself, and we hold quarterly meetings with the chief judge of our district, and the purpose of those meetings is to bring to the court's attention concerns that practitioners are having in terms of case management or case progress.

We have also addressed matters such as greater utilization of magistrate judges in order to move the matters along, and we have implemented, in cooperation with the chief judge and the members of the middle district court a law school practice role. And I think that is a very effective means of readying those who are students for the practice of law.

Senator METZENBAUM. What was your major area of accomplishment in the athletic world? I see you have got a number of awards in sports.

Mr. VANASKIE. Maybe the thing I am most proud of now—the older you get, of course, the more important they seem to become, but I was inducted into the Schmoken, PA, Chapter of the Pennsylvania Hall of Fame, and that was a very gratifying recognition, I suppose. But maybe in terms of how I feel about the other recognitions, it would have been recognized as the first academic all-American in football.

Senator METZENBAUM. In football?

Mr. VANASKIE. In football, sir.

Senator METZENBAUM. Very good.

Senator COHEN.

Senator COHEN. I would just challenge one statement you made. I would say the older one gets, the award that one achieved seems to loom larger in the memory. As someone who was engaged in a lot of college activities, they seem much more magnanimous now in retrospect than they were at the time.

Mr. VANASKIE. I agree with you.

Senator COHEN. I read your article in 1977 about the Supreme Court decision in the *National League of Cities v. Usery*.

Mr. VANASKIE. Yes.

Senator COHEN. I was curious about the language that you used, because you discussed the precedents that the court both used and discarded and you wrote that in *National League of Cities* the Court has "fabricated a new method for reviewing commerce power, regulations and State functions, namely the State sovereignty doctrine."

I was curious about your use of the words "they have fabricated." As an attorney, I am sure Senator Specter and Senator Metzenbaum would say that attorneys or Leagues of Cities or any other plaintiff does not necessarily fabricate, but does advocate a particular position. They were successful in 1976 when the case was decided, and then a short time thereafter the court reversed, as I recall, and basically came, I assume, to your own position on this.

It raised a question in my mind. Do you think the court was correct in overruling the 1976 decision, or should the court have applied stare decisis in that matter?

Mr. VANASKIE. I do not know if I have a position, but the premise of the paper, the premise of the article was that rationales were developed in order to justify a certain outcome.

Senator COHEN. I think you used the word "fabricated."

Mr. VANASKIE. I used the word "fabricate," yes, absolutely. And in terms of do I agree that there are instances where there should be—your specific question, Senator Cohen, is did I agree with the result in the *Garcia* case, *Garcia v. San Antonio School District*, I believe.

In terms of an outcome, it seemed to me that when we looked at decisions that involved exercise of the commerce clause power insofar as it affected State governmental matters, matters of State interests, the court in *Maryland v. Wirtz* had spoken pretty clearly on that point, but again a divided court, and it seemed to me that we were obtaining results based upon a judiciary's view or the court's view of the proper structure of federalism, what it ought to be.

I thought the instance of using the State sovereignty doctrine in the *National League of Cities* case was an instance of judicial activism, where the legislative policy was disregarded. It seems to me, and I believe it would be correct, that the premise of the article is that questions of the proper structure and allocation of power in the Federal system is left to the political bodies and not to the judiciary.

Senator COHEN. So if you have a case in which you believe the prior court decision was the result of judicial activism, does that mean that you would support a reversal of that decision. In other

words suppose when you have a different court come in by virtue of the replacement of members, and they look back and say we had a very activist court during the 1970's and the 1980's. Would it be proper for the court to say it is taking a different tact now, that a prior decision was the result of judicial activism and that it is being overruled?

The question I really have is, do you think that a court should apply stare decisis? Is there a timeframe that you look at?

Mr. VANASKIE. There is no timeframe, and I would mention that the *Maryland v. Wirtz* case was decided in 1968, so 8 years later you had that overruled, as well.

But my responsibility as a district court judge, if confirmed, is to follow the law as it is established, and I have no function in terms of deciding whether or not that was an exercise of judicial activism or not. It is simply to apply the precedent as it has been established by the Supreme Court, of, if there is none, by the third circuit.

Senator COHEN. In other words, if you were presented with a similar case, even though you felt the League of Cities, if it were in effect at the time, was the product of either fabrication or novelty advocacy, would you uphold until it was overruled?

Mr. VANASKIE. Yes, Senator.

Senator COHEN. I think that is all I have, Mr. Chairman.

Senator METZENBAUM. Thank you very much, Senator Cohen. Senator Specter.

Senator SPECTER. Thank you very much, Mr. Chairman. I have no questions. You were in the room and heard what I had to say to Ms. Rendell about Senator Thurmond's admonition. Good luck.

Mr. VANASKIE. Thank you, and I agree wholeheartedly with what you said, Senator Specter.

Senator SPECTER. Thank you.

Senator METZENBAUM. Thank you very much, Mr. Vanaskie, and good luck to you.

Mr. VANASKIE. Thank you.

Senator METZENBAUM. Our next witness is Helen Georgena Berrigan, New Orleans, LA.

Do you swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Ms. BERRIGAN. I do.

TESTIMONY OF HELEN GEORGENA BERRIGAN, OF LOUISIANA, TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF LOUISIANA

Ms. BERRIGAN. If I could, I would like just to say as a preface that this has been a very extraordinary week for me. This past Monday, my entire family, my brothers and sisters and nieces and nephews got together for the first time in over a decade to celebrate my father's 100th birthday.

Senator METZENBAUM. Fantastic.

Ms. BERRIGAN. And it was that afternoon of his birthday that the call came from the Justice Department to head on down here. My dad unfortunately, because of his age, could not make the trip. He very much wanted to be here. He is the reason we have the film crew, so I just wanted to say hi.

I do have a number of very important people here with me today. First, my husband and best friend Joe.

Senator METZENBAUM. We are glad to have you with us.

Ms. BERRIGAN. And my sister Kathy from Louisiana, who is my second best friend. Until I met Joe, she was my first best friend.

My law partner Jim Brady, who has helped guide me through this whole unusual process. Also, my mom died many years ago, and there is a woman here who kind of was a surrogate mom for me during some important times of my life, and that is Maureen Finnigan, and I would like her to stand.

And then a very good buddie of mine from my hometown who went to the University of Wisconsin with me and was my roommate here in Washington when I had the distinction of working for Senator Hughs and Senator Biden, Stu Jackson Pardo.

Senator COHEN. You worked for Senator Biden, too?

Ms. BERRIGAN. Yes, sir.

Senator COHEN. We may have to take a reconsideration of your nomination. [Laughter.]

Ms. BERRIGAN. My dad did want me to tell Senator Cohen that, for all his 100 years, he has been a Republican. [Laughter.]

Senator METZENBAUM. You obviously did not come from Louisiana originally?

Ms. BERRIGAN. No, sir, I am originally from Larchmont, NY.

Senator SPECTER. You all sound like it.

Senator METZENBAUM. Do you have an opening statement?

Ms. BERRIGAN. One other comment I forgot to make is that my mom and all her family were from Tip City, OH, and we spent many a summer—

Senator METZENBAUM. Whereabouts in Ohio?

Ms. BERRIGAN. Tip City, outside Dayton.

Senator METZENBAUM. Well, we are very happy to have you here.

In 1987, you wrote an article suggesting as an alternative to incarceration that an inmate be sentenced to a boot camp. After successfully completing boot camp, the offender would be eligible for parole release or he would be intensely supervised and subject to a curfew house arrest.

As you know, the Senate recently passed a crime bill which includes a provision of established Federal boot camps for nonviolent offenders. If that bill becomes law and you are confirmed, how would you determine which nonviolent offenders to send to boot camp?

Ms. BERRIGAN. We have a similar type statute in Louisiana, and the statute sets forth the offender classes that would be eligible. I think you have to be sentenced to a sentence of 7 years or less, it is certain particular offenses, the judge has to make the recommendation, there has to be no history of violence. There is a number of qualifications that have been put into the statute.

I would hope that if such a similar procedure was enacted by Congress, it would also set forth the guidance in the statute as to what offenders would be eligible for consideration.

Senator METZENBAUM. As a district court judge, would you consider yourself bound by Supreme Court and circuit court decisions, even though you might personally feel quite strongly that some of

those decisions were incorrect or failed to interpret the Constitution as you thought it should be interpreted?

Ms. BERRIGAN. I think one of the most important aspects of the law is stability and respect for stare decisis and prior jurisprudence, and I would consider myself totally bound by both fifth circuit and U.S. case law.

Senator METZENBAUM. As a practicing lawyer—and you are a practicing lawyer I understand now—what type of work did you do?

Ms. BERRIGAN. Primarily criminal defense and postconviction pardon and parole, but criminal related law.

Senator METZENBAUM. I do not have your record in front of me, but have you been in any extracurricular activities? What kinds of any have you been involved in?

Ms. BERRIGAN. Well, I am not sure what you mean by extracurricular. I have been active in the Louisiana American Civil Liberties Union for a number of years. I have been active in political organizations, for example, an organization to encourage women to run and serve in public office. I have done fund-raising activities on behalf of a hospice for AIDS victims and patients in New Orleans. I have done things in the community that I hope improve the community.

Senator METZENBAUM. It sounds pretty good to me.

Ms. BERRIGAN. Thank you.

Senator METZENBAUM. The Judicial Conference, which is the policy-making arm of the Federal courts, is in the midst of a 3-year experiment allowing the use of cameras in Federal courts during civil trials. A restriction on that experiment is that the media, when it is interested in televising a particular trial, must notify the presiding judge in advance and the judge may refuse the request at his or her discretion.

What factors would you use in making your decision as to whether to agree to a request to televise a certain trial?

Ms. BERRIGAN. I think the primary consideration is giving the litigants a fair trial. I guess at the one side I would be concerned as to how the televised aspect of it might affect the witnesses, whether the witnesses would be intimidated or somehow affected in their testimony by being on television, how the jury might be affected, if it was a highly emotional case, would the jury be concerned about being on television and what folks outside might think. Those are the things I would probably take into consideration.

Senator METZENBAUM. Senator Cohen.

Senator COHEN. Thank you very much.

Ms. Berrigan, you wrote an article called "The Purpose of Punishment"—

Ms. BERRIGAN. Yes.

Senator COHEN [continuing]. In which you list the four traditional philosophies of correction being rehabilitation, deterrence, incapacitation and retribution. I think you indicated that retribution is at best shortsighted, and at worse dangerously destructive to individuals who are otherwise salvageable.

The question I have is what role, if any, does retribution have in the criminal justice system, as far as you are concerned?

Ms. BERRIGAN. Well, I think there is a natural need for society to say to someone in a forum or either through our criminal justice system that you cannot do certain things to your fellow citizens. If retribution is that, if it is the just deserts concept that you have done wrong and, therefore, you must pay the consequences of what you have done, that is salutary and important, because people do have to be held responsible for what they do.

I think rehabilitation also is an important consideration, and you did read the complete sentence where I indicated that when people can be salvageable, and I think rehabilitation, for example, should always be at least an opportunity. Only a person themselves can decide they want to rehabilitate themselves. The system cannot do it to them, but certainly the opportunity should be there.

So I think all four of those ingredients are a part of our corrections system and probably will remain so and appropriately so.

Senator COHEN. One of the problems I think you indicated before is that we need to maintain respect for the courts and our judicial system, but that respect is breaking down. Now, it may be that the loss of respect is endemic. It is affecting all of our institutions. But more and more I think the focus has been directed toward the courts, as well, because of the celebrated cases. For example, the Monica Seles case in Germany, in which she was attacked with a pair of scissors or a knife, as I recall, and stabbed, and yet the court released that individual and put him on probation. There was a natural outcry, saying a tremendous injustice has been done.

You can go through case after case in which there is a horrible example of a vicious crime being committed against an individual, and society says something must be done to acquire retribution in that case. The most recent one I can think of is just this week there was a case in which a man was sitting in his car and an individual came up and had a gun and demanded the man get out of the car. He locked his doors and ducked down on the seat and was lying prone on the seat, and the individual who was trying to get in started firing the gun into the car and succeeded in paralyzing that individual for life.

The reaction of the victim's family was "I want the perpetrator of the crime to live exactly as my father has to live the rest of his life." Now, retribution in this case does serve a very valid purpose in our system. It is not to say that any court or society is going to impose an equal level of retribution. We are not going to see that that individual is paralyzed, but the emotion that is involved collectively in society, particularly for that family, is so strong that the sentence that individual receives, if in fact he is ever convicted, seems to me should be very severe.

To often, we tend to take into account the salvageability or the rehabilitation of the individual and we tend to ignore the severity of the pain that individual has inflicted. To the extent we continue to do that, society is going to see the rise of vigilante groups, people taking the law into their own hands, people equipping themselves with their own weapons, riding around with guns in their cars to prevent car jackings. There is a common sense that we have been too easy in terms of the penalties that have been imposed. People go in prison and they are back out on the street.

You cannot turn on a program on television at nighttime now, "Courts and the Law," or "Cops Out on the Beat," without hearing every individual in the law enforcement business rail against the criminal justice system complains about spending more time filling out paperwork than the criminal will to serve in prison. And you see people going to the system and coming out.

As a matter of fact, that is one of the reasons I think the President endorsed the Senate's crime bill that contained the so-called three-strikes-and-you-are-out provision, because there is a collective anger that is building in society saying that we are putting too much emphasis perhaps on rehabilitation and not enough on punishment.

Now, in your article I think you pointed out that there is some moderate correlation that is shown to exist between deterrence and the certainty of imprisonment as a sentence, even though this is subject to question. I do not disagree with that. I have heard a number of speeches given by Rev. Jesse Jackson in which he points out that for many of the individuals who are now being sent off to prison, it is not a step down, it is a step up. They are coming out of poverty and deprivation and lawlessness, and going to a place where they can in fact receive meals and cable television and pretty warm accommodations which they do not have out on the street.

So I am not sure what the answer is. There maybe a correlation between the certainty of imprisonment and deterrence. I do not know. I do not have the answer to that, but we are all struggling with that right now. It seems to me that the more we read about it, we have got at least one generation, possibly two, that are coming up in an atmosphere which is almost tantamount to the "Lord of the Flies." There is no sense of morality.

I saw one interview recently in which inmates, career criminals, who have been in prison for 15-20 years are shocked by the amorality of the individuals coming into the prison system today. They would say, that when they robbed a person they would take the money and leave. Today, criminals take the money and kill you anyway.

So we have a long-term problem and we have a short-term problem. The long-term problem obviously has to do with racism in our society, with giving people who have been deprived an opportunity to rise and to flourish and receive an education and to nurture those individuals who do not otherwise have a fair chance.

At the same time, we have a short-term problem, and the short-term problem has to be to get the violent criminals off the street, because most people today, particularly in this city—and I am sure in both Ohio and Louisiana—are frightened. Fear is the biggest issue on the minds of the American people today, even above that of health care reform or welfare reform. Fear of being a victim of a violent criminal act is perhaps foremost in the minds of the American people.

So I hope as you serve in this capacity, you will take that into account, understanding that retribution, a collective societal retribution, is also a very important element in preserving a respect for the law.

Ms. BERRIGAN. I have been a crime victim myself, so I know the feeling.

Senator COHEN. Thank you.

Senator METZENBAUM. Thank you very much, Senator Cohen.

Ms. Berrigan, what is the Forum for Equality?

Ms. BERRIGAN. The Forum for Equality is an organization that was created about 4 or 5 years ago now in New Orleans, with two purposes. The first purpose was to promote equal rights for all minorities, regardless of race, religion, gender, age, sexual orientation, disabilities, basically the whole gamut, almost like an umbrella, but to be also a political advocate which, for example, the American Civil Liberties Union is not. The ACLU does not get involved in political campaigns. The Forum for Equality does. It endorses candidates, interviews candidates and so forth.

The second mission of the Forum for Equality was to promote good government. Louisiana has an unusual history in that regard, so we felt that it was important to have that as part of our mission, as well. So it is really a dual mission organization to promote equal rights for all minorities and good government from all our public officials.

Senator METZENBAUM. Thank you very much. I must say that I did not think I would ever sit here and have the president of the ACLU in New Orleans and a very active member of the Forum for Equality—I guess you are a member—come up as a nominee for the Federal district bench. I am pleased to see it, and I congratulate you. I more particularly congratulate the Senators who I assume nominated you.

Ms. BERRIGAN. Thank you very much, Senator.

Senator METZENBAUM. Thank you.

The last nominee is Tucker Melancon, a Greek name, sir?

Mr. MELANCON. French.

Senator METZENBAUM. Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Mr. MELANCON. I do.

TESTIMONY OF TUCKER MELANCON, OF LOUISIANA, TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF LOU- ISIANA

Senator METZENBAUM. Would you like to introduce members of your family?

Mr. MELANCON. With the chairman's permission, I would like to remain standing, so I do not forget. As Senator Breaux said in his introduction, I have got quite a contingent to come up from Louisiana and I have some friends from the Washington area I would like to introduce.

Senator METZENBAUM. Please, whatever is convenient for you.

Mr. MELANCON. My wife Kitty; my daughter Robin and her husband A.J. Roy; my son Ben and his brand-new wife Celeste; my law partner and step-brother Rodney Rabalais, his wife Wanda, and my nephew Kevin; and a friend of mine from Marksville, LA; from my hometown Glenn Goudeau and his wife Jo, and their sons Beau and Jacques. I also have from Senator Breaux's office a young lady from my hometown, Celeste Coco, and another young lady from my hometown who is a student in Washington, Shibohan Dupuy.

Last, I would once again like to recognize a long-time great friend of mine, Jim Brady.

Senator METZENBAUM. Thank you very much. I am pleased that we have helped improve the airline economy between Louisiana and here. Between you and Ms. Berrigan, it is a good grouping.

Senator COHEN. You have also complicated our lives. We had just gotten used to addressing General Shalikashvili. Now you have given us a new name to master here today.

Senator METZENBAUM. Do you have an opening statement?

Mr. MELANCON. No, Mr. Chairman, other than to say that I am honored to be here.

Senator METZENBAUM. You served on the Committee to Study the Backlog in Louisiana Court of Appeal for the First and Third Circuits. Given your experience, if confirmed, what steps will you take to ensure that your docket progresses at as quick a pace as fair and reasonable?

Mr. MELANCON. Mr. Chairman, I served on that committee by appointment of the Louisiana Supreme Court and I think the problems that we found in the first and third circuits in the State courts of Louisiana are not, based on my present appreciation of what I will face as a Federal judge, if I am so lucky to be confirmed, are not the same.

I agree with what has been said earlier, that I think a Federal judge needs to be a hands-on judge, if you are going to be in a position to control the docket, and by that I mean to be involved at each stage. I think my appreciation of rule 16 conferences and the procedures that have been recommended, based on my recent readings in the use of magistrate judges, will help in that regard.

In my particular situation, the Monroe division, which I have been nominated for, the six other judges of the western district have done a magnificent job in trying to keep that docket, particularly the criminal docket, as current as possible. This position has been vacant for approximately 2 years and they have done a real good job. I think right now there are about 430 cases pending.

Senator METZENBAUM. Mr. Melancon, I notice that you have had a considerable business interest in a number of different businesses. What portion of your time has been devoted to the law and what portion to your business enterprises?

Mr. MELANCON. Mr. Chairman, I would say candidly about 110 percent of my time to the law. Except for a period from about 1980 to 1991, when I was involved as an investor in a restaurant, the investment went bad because of some improper management, and for a short time I was actually in the restaurant business.

Other than that, the business activities that are mentioned in the information I have supplied to the committee were basically as investor in most instances with a step-brother and a brother-in-law, and I did serve in a technical sense as a member of the board of directors for a closely held corporation. But I have been a full-time lawyer for most of the 20-plus years that I practiced law.

Senator METZENBAUM. What kind of community activities have you engaged in?

Mr. MELANCON. I have been involved basically early on when I got out of law school in civic organizations such as the Jaycees. I have been very active in the Boy Scouts, not in recent years, but I was an Eagle Scout and was involved when I got out of law school

and during the period in which my son was a Boy Scout. He is also an Eagle Scout.

Senator METZENBAUM. As you know, the Rules of Civil Procedure allow judges to impose sanctions against lawyers or parties who file frivolous lawsuits. Recently there has been much debate over the courts' increased willingness to punish litigants under rule 11.

Now, I have not practiced for a good many years, but I am rather sensitive about the pendulum swinging to the place where the judges start to punish lawyers for bringing cases, rather than letting the cases proceed or else dismissing the case and not punishing the lawyers. Some lawyers have actually argued the rule has been applied to chill pursuit of new and creative arguments in developing areas of the law, such as civil rights. One judge recently stated "today's frivolity may be tomorrow's precedent."

Given your experience as a litigator, what is your view about when rule 11 sanctions should be imposed?

Mr. MELANCON. Mr. Chairman, I share your concern that rule 11 can, if misused, have a chilling effect, and I was struck by some of the comments Senator Specter made to both of the nominees from Pennsylvania in the way that a judge treats the members of the bar and the public that comes before a court.

But I think that rule 11, when used appropriately, there is a valid reason for it, but I think it can certainly be abused. Again, as a practicing lawyer, I do not think that will be a problem for me.

Senator METZENBAUM. Were you plaintiffs' lawyer or defendants' lawyer mostly?

Mr. MELANCON. Well, it is quite interesting to answer the question. I practice in a rural area, a town of about 5,000, and I guess for the first 17 years I was primarily a plaintiffs' lawyer. For several reasons, the last 2½ to 3 years I have primarily been a defense attorney, although my firm, which is comprised of my partner who I introduced earlier and one associate, continues to have a varied practice.

Senator METZENBAUM. Senator Cohen.

Senator COHEN. Thank you, Mr. Chairman.

Is your partner's name Rabalais?

Mr. MELANCON. Rabalais.

Senator COHEN. Rabalais, I want to make sure I get that one right.

First of all, Senator Metzenbaum I think has a strong conflict of interest in asking you the question as to whether or not you would be receptive to complaints being brought by creative plaintiffs. He is about to leave the Senate and he will probably go back into the practice of law. Given his creative talents on the Senate floor, he is probably worried that the courts are going to take into account that he might be filing frivolous lawsuits, but most of us by virtue of experience know that he will be in the forefront or at least 10 years ahead of his time. So I think there is a conflict of interest with that statement.

Senator METZENBAUM. There are a few cases I tend to file in New Orleans. [Laughter.]

Senator COHEN. Most of your practice, as I understand it, has been on the civil side, if not all of it, at the State level. Have you practiced to any significant degree before the Federal courts?

Mr. MELANCON. In recent years, Senator, I have had the opportunity as part of the defense work I have been doing to represent the Louisiana Sheriff's Risk Management Program, and we have been involved in a number of prisoner cases, some personal injury cases against the Louisiana Sheriff's Risk Management Program.

I have also had the opportunity to have a number, I guess over the 20 years probably 15 to 20 admiralty-type cases, and I have had several trials against various Government entities, the VA hospital comes to mind. The bulk of my practice has been in State court.

Senator COHEN. I assume, like Ms. Berrigan, you are going to a trial judges' school?

Mr. MELANCON. This week, yes, sir.

Senator COHEN. I would just say for the benefit of those in the audience I suspect that people are not aware of exactly how demanding a trial judge's job is. You have got to make quick decisions on spur-of-the-moment evidentiary decisions, and someone is always looking over your shoulder. They may be big cases or small cases, but eventually you are going to have an appellate court looking over your shoulder and possibly a Supreme Court, and it is a tremendous burden upon any Federal district court judge. I would say more so than for the circuit court judges.

They have a tough job, but it is really not nearly as tough as you will have, because you are on the spot and you must make instantaneous decisions in terms of whether something is admitted, excluded, overruled, et cetera.

So good luck to you in your school. It is going to be very important to you, and I am sure that both of you will have to have some on-the-job experience or training. It is going to be a very difficult job. That is why we insist that the people who come before us are as qualified as possible and as highly intelligent and capable as possible, because it is going to be a very vigorous and demanding job on your part.

Good luck.

Mr. MELANCON. Thank you very much, Senator.

Senator METZENBAUM. Thank you very much, Senator Cohen.

Thank you, I might say, for spending the afternoon here.

Thank you very much, and we wish you well.

Mr. MELANCON. Thank you, Mr. Chairman.

Senator METZENBAUM. This hearing stands adjourned.

[Whereupon, at 4:22 p.m., the committee was adjourned.]

[Submissions for the record follow:]

SUBMISSIONS FOR THE RECORD

United States Senate

1. Full name (include any former names used).

Judith Ann Wilson Rogers (Judy)

2. Addresses: List current place of residence and office address(es):

Home: 111 Third Street, N.E.
Washington, D.C. 20002
Telephone: 202-546-7472

Office: D.C. Court of Appeals
500 Indiana Av., N.W.
Washington, D.C. 20001
Telephone: 202-879-2770

3. Date and place of birth:

July 27, 1939; New York, N.Y.

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es):

Divorced, August 8, 1978, from Stephen Childs Rogers, Esquire, 503 A Street, S.E., Washington, D.C. 20003 (202-546-5926).

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Radcliffe College: 1958-1961, A.B. degree, cum laude (1961).
Harvard Law School: 1961-1964, LL.B (1964).
University of Virginia Law School: 1986-1988, LL.M. degree (1988).

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Summer 1961: survey analyst for Conover-Mast Publishing Co., 205 East 42nd Street, New York, N.Y.

Summer 1962: Assistant to W. Barton Leach, Professor of Law,

Harvard Law School, Cambridge, MA.

Summer 1963: Aide to counsel for the President's Commission on Juvenile Delinquency and Youth Crime, U.S. Department of Justice, Washington, D.C.

1964-65: Law Clerk, Juvenile Court of the District of Columbia.

1965-1968: Assistant United States Attorney for the District of Columbia, U.S. Department of Justice, Washington, D.C.

1968-1969: Staff attorney, San Francisco Neighborhood Legal Assistance Foundation, 1095 Market Street, San Francisco, CA.

1969-1971: Trial attorney, Criminal Division, U.S. Department of Justice, Washington, D.C.

1971-72: General Counsel, Congressional Commission on the Organization of the District Government, Washington, D.C.

1972-74: Legislative Program Coordinator, Office of the Assistant to the Mayor-Commissioner, and subsequently in the Office of the Mayor, District of Columbia government.

1974-79: Special Assistant for Legislation to the Mayor, District of Columbia government.

1979 (January to April 15): Assistant City Administrator for Intergovernmental Relations, District of Columbia government.

1979-1983: Corporation Counsel for the District of Columbia.

1983 to present, associate judge (1983-88) and Chief Judge (November 1, 1988 to present), District of Columbia Court of Appeals.

7. Military Service: Have you had any military service? If so, give particulars, including dates, branch of service, rank or rate, serial number and type of discharge received.

No.

8. Honors and Awards. List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Phi Beta Kappa, Radcliffe College, June 3, 1986.

Certificate of Appreciation, in recognition of outstanding service as Chief Judge of the District of Columbia Court of Appeals, Bar Association of the District of Columbia, November

15, 1991.

Woman Lawyer of the Year Award, Women's Bar Association of the District of Columbia, May 30, 1990.

Chairman's Special Award, The Judicial Council of the National Bar Association, August 1, 1990.

Charlotte Ray Award, Greater Washington Area Chapter, Women Lawyers' Division, National Bar Association, 1989.

Distinguished Public Service Award, District of Columbia government, September 13 1983.

Outstanding Performance Citation by Mayor Walter E. Washington, for period April 1, 1977 to March 31, 1979.

Resolution of the Council of the District of Columbia in Recognition of skillful and effective representation of the District government, "Judith W. Rogers, Esquire, Resolution of 1983," No. 5-285, July 12, 1983.

Proclamation by Mayor, proclaiming September 13, 1983 as "Judith W. Rogers Day" in the District of Columbia in recognition of dedicated and distinguished service.

Citizens' Citation for outstanding service, Self-Determination for D.C. Coalition, following enactment by Congress of the D.C. Self-Government and Governmental Reorganization Act of 1973.

Honorary Doctor of Laws, University of the District of Columbia School of Law, May 1992.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Member:

American Bar Association, 1984 to present;

Life Member of the Fellows of the American Bar Foundation, 1992

D.C. Bar, 1974 to present.

Bar Association of the District of Columbia, 1966-67; 1983 to present.

Washington Bar Association, 1983 to present.

National Bar Association, 1988 to present.

National Association of Women Judges, 1983 to present.

Council for Court Excellence, ex officio, 1988 to present.

Conference of Chief Justices, 1988 to present:

Executive Committee, 1993 to present.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Conference of Chief Justices, 1988 to present.
 Wider Opportunities for Women, Board of Directors, 1972-74
 Friends of the D.C. Superior Court, Board of Directors,
 1972-74
 Radcliffe College, trustee, 1982 to 1988
 Harvard University, Visiting Committee to the law school,
 1984 to 1990
 St. Mark's Episcopal Church, 1981 to present.
 The Cosmos Club, 1990 to present.
 The Lawyers Club, 1990 to present.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

United States Supreme Court, May 14, 1979.
 United States Court of Appeals for the District of Columbia Circuit, October 11, 1965.
 United States District Court for the District of Columbia, June 21, 1965.
 District of Columbia Court of Appeals, April 1, 1972.
 Superior Court of the District of Columbia, April 1, 1972.
 D.C. Court of General Sessions, October 7, 1969. (Admitted to predecessor court, June 21, 1965)

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech and they are readily available to you, please supply them.

All of my published writings appear in the form of (1) testimony before Congress or the Council of the District of Columbia on proposed legislation, including budget requests, and (2) published opinions as a judge on the D.C. Court of Appeals. A summary of the nature of my testimony before the D.C. Council appears at Tab 1.

My speeches have addressed the needs of the Judicial Branch of the District government, but generally have not addressed legal policy. I attach a copy of my speech to the Fellows of the

American Bar Foundation, District of Columbia, May 12, 1992. See Tab 2.

13. Health: What is the present state of your health. List the date of your last physical examination.

My health is excellent. My last physical examination was on February 22, 1993.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

1983: Appointed by President Ronald Reagan, and confirmed by the United States Senate, to a fifteen-year term on the D.C. Court of Appeals.

1988: Designated by the D.C. Nomination Commission to a four-year term as Chief Judge, D.C. Court of Appeals, beginning November 1, 1988.

1992: Redesignated by the D.C. Nomination Commission to a second four-year term as Chief Judge, D.C. Court of Appeals, beginning November 1, 1992.

The D.C. Court of Appeals is the highest court in the District of Columbia. Created by Congress in 1970, the Court functions like the state appellate courts. It performs both error-review and jurisprudential functions. Appeals from decisions of the D.C. Court of Appeals are to the United States Supreme Court on a petition for certiorari review. The Court consists of nine judges, who sit in three-judge panels; occasionally, the Court sits en banc.

The D.C. Court of Appeals has jurisdiction to hear all appeals in civil, criminal and administrative agency cases. It also has original jurisdiction in some matters, including attorney discipline. Because the District of Columbia has state, county and municipal responsibilities, the D.C. Court of Appeals hears the same types of appeals as the appellate courts in the states, with the exception of state constitutional issues. The federal rules of criminal and civil procedure apply in the trial court, except as modified upon approval of the Court of Appeals. The United States Attorney for the District of Columbia is both the local and federal prosecutor in the District of Columbia, and hence, the Justice Department appears in nearly all criminal appeals.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written;

(2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of these opinions lists were not officially reported, please provide copies of the opinions.

(1) Ten significant opinions that I have written on behalf of the D.C. Court of Appeals:

1. *Hessey v. Bd of Elections & Ethics*, 601 A.2d 3 (D.C. 1991) (en banc).
2. *Scott v. United States*, 559 A.2d 745 (D.C. 1989) (en banc).
3. *Battle v. U.S.*, 630 A.2d 211 (D.C. 1993).
4. *Johnson v. U.S.*, 616 A.2d 1216 (D.C. 1992).
5. *Caldwell v. U.S.*, No. 595 A.2d 961 (D.C. 1991)
6. *Durant v. U.S.*, 551 A.2d 1318 (D.C. 1988).
7. *Newspapers, Inc. v. Metropolitan Police Dept.*, 546 A.2d 990 (D.C. 1988).
8. *Stutsman v. Kaiser Found. Health Plan*, 546 A.2d 367 (D.C. 1988).
9. *Embassy of Benin v. D.C. Bd. of Zoning Adjustment*, 534 A.2d 310 (D.C. 1987).
10. *Sherrod v. U.S.*, 478 A.2d 644 (D.C. 1984).

(2) Summary and citation where my decision was reversed or affirmed with significant criticism:

This has occurred when the en banc court has reversed a decision of a three-judge division:

1. *Harris v. U.S.*, 602 A.2d 154 (D.C. 1992) (en banc) (whether "plain error" requiring reversal occurred where appellant claimed prosecutorial misconduct, trial judge error, and unprofessional conduct by defense counsel)

2. *Speight v. U.S.*, 569 A.2d 124 (D.C. 1989) (en banc) (constitutionality of statute allowing enhancement of sentence, in absence of finding of culpability for first offense, when

defendant commits second offense while on pretrial release for first offense and the sentence exceeds the combined maximum penalty for conviction for second offense and the penalty for violating a condition of pretrial release).

3. *Cousart v. U.S.*, 618 A.2d 96 (D.C. 1992) (en banc) (in absence of articulable suspicion of automobile passenger, whether passenger was seized in violation of the Fourth Amendment when told by police officer holding shotgun in the "ready" position to reach for the ceiling of car).

(3) Significant opinions on federal or state constitutional issues.

1. *Darab v. U.S.*, 623 A.2d 127 (D.C. 1993)
2. *In re A.S.*, 614 A.2d 534 (D.C. 1992)
3. *Caldwell v. U.S.*, 595 A.2d 961 (D.C. 1991)
4. *Guadeloupe v. United States*, 585 A.2d 1348 (D.C. 1991)
5. *Galberth v. U.S.*, 590 A.2d 990 (D.C. 1991); after remand, *Taylor v. U.S.*, 595 A.2d 1007 (D.C. 1991)
6. *Wheelock v. U.S.*, 552 A.2d 503 (D.C. 1988)

16. Public Office: State (chronologically) any public office you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Assistant United States Attorney for the District of Columbia, appointed by Attorney General Nicholas deB. Katzenbach, November 29, 1965. Served until June 1968.

Corporation Counsel of the District of Columbia, appointed by Mayor Marion S. Barry, April 16, 1979, and confirmed by the Council of the District of Columbia, June 19, 1979. Served until September 15, 1983.

I was an unsuccessful candidate for election to the Board of Directors of the D.C. Bar in the late 1970s.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school, including:

1. whether you served as a clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

1964-65: Law Clerk, Juvenile Court of the District of Columbia: Chief Judge Morris Miller (now deceased). Some assignments from the other judges: Judge Marjorie Lawson, Judge Orman Ketchum, Judge Aubrey Robinson, and Judge John Fauntleroy.

2. whether you practiced alone, and if so the addresses and dates;

I have never practiced alone.

3. the dates, names, and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

1965-1968: Assistant United States Attorney for the District of Columbia, U.S. Department of Justice, Washington, D.C. Assigned for one year to the local court to prosecute misdemeanor jury and non-jury trials, conduct preliminary hearings, motions, arraignments, and presentments in felony cases. Supervisor: Honorable Tim C. Murphy, former trial court judge and now Associate Attorney General, U.S. Department of Justice, 10th Street and Constitution Av., N.W., Washington, D.C. (202-514-4945).

Thereafter, assigned to the United States District Court for the District of Columbia to handle special proceedings (habeas corpus, collateral attacks on criminal convictions, extradition, and civil commitments). Supervisor: Oscar Altshuler (now deceased). Also wrote three briefs in criminal cases before the U.S. Court of Appeals for the District of Columbia Circuit and prepared comments for the United States Attorney on federal legislation.

In 1967, assigned for three months to Office of Assistant Attorney General Fred Vinson to work for the Office of Criminal Justice on reorganizing the District of Columbia court system. Prepared a report for the United States Judicial Conference Committee on the Administration of Justice, chaired by Gerhart Gesell (later judge on U.S. District Court, D.C., now deceased) on a family court branch in a restructured local court (addressing rules and procedure, role of counsel, comparison with other jurisdictions). Resigned, June 1968, because my husband had accepted a clerkship in San Francisco, California.

1968-1969: Staff attorney, San Francisco Neighborhood Legal Assistance Foundation, 1095 Market Street, San Francisco, California. Did legal research on various class action suits in

federal court. Represented clients in state administrative proceedings. Taught a clinical course on poverty law with two other attorneys at Boalt Hall, University of California at Berkeley, California. Supervisors: Jerry Carlin and Sidney Wolinski, Esq.

1969-1971: Trial attorney, Criminal Division, U.S. Department of Justice, Washington, D.C. Assigned to the Office of the Deputy Attorney General to develop legislation to reorganize the District of Columbia courts. Part of a four-lawyer team that prepared draft legislation, department and legislative reports, and testimony, and worked with congressional committees as the bill was considered by the House and Senate. The legislation creating a state-type court system for the District of Columbia was enacted as the D.C. Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358 (July 29, 1970), 84 Stat. 473. Supervisor: Donald E. Santarelli, Esq., 1155 Connecticut Av., N.W., Washington, D.C. 20036 (202-466-6800).

In August 1970, assigned to the Legislation and Special Projects Division to prepare legal memoranda for guidance of United States Attorneys' offices, reports on congressional legislation, and analysis of proposed changes in the Federal Rules of Criminal Procedure. Supervisor: Harold D. Koffsky (deceased).

1971-72: General Counsel, Congressional Commission on the Organization of the District Government, Washington, D.C. Responsibilities included review of recommendations to change the organization and responsibilities of the District government. Worked with management staff on proposed legislation to establish a new personnel system for District government employees. Supervised five consultants who were examining youth services in response to the recommendations in the 1966 report of the President's Commission on Crime in the District of Columbia. Supervisor: John E. Hogan, Executive Assistant and Director, 213 11th St., S.E., Washington, D.C. (202-544-2532).

1972-74: Legislative Program Coordinator, Office of the Assistant to the Mayor-Commissioner, and subsequently the Office of the Mayor, District of Columbia government. Responsible for the development of the Mayor's annual legislative program to Congress. During this time I did substantial work with District and federal officials, congressional committees and staff, on legislation to provide home rule in the District of Columbia. The legislation was enacted as the D.C. Self-Government and Governmental Reorganization Act of 1973, Pub.L. 93-198 (December 24, 1973), 87 Stat. 774. Supervisor: Hon. Walter E. Washington, 408 T Street, N.W., Washington, D.C. 20001 (202-DU 7-4613).

1974-79: Special Assistant to Mayor Walter E. Washington for Legislation. Responsible for preparation of the Mayor's annual

legislative programs to Congress and the new Council of the District of Columbia. In conjunction with the heads of the departments and agencies, developed legislative recommendations for the Mayor, drafted and analyzed legislative proposals, and prepared and presented testimony. In 1977, served as the Mayor's liaison to the President's Task Force on the District of Columbia, chaired by Vice President Walter Mondale; responsible for preparing position papers.

1979: January to April 15: Assistant City Administrator for Intergovernmental Relations, District of Columbia government. Responsible for annual legislative programs to Congress and the Council of the District of Columbia, and for the development of relationships with regional and national organizations.

1979-1983: Corporation Counsel for the District of Columbia. The Corporation Counsel serves in a capacity similar to that of a state attorney general. Actively supervised an office of 200 attorneys, who appeared in the federal and District of Columbia courts; prepared official legal opinions; commented on District and congressional legislation; advised departments and administrative agencies on a variety of legal issues; and obtained significant funding increases for the District's legal office. See *Annual Reports of the Office of the Corporation Counsel*, at Tab 3.

1983 to present, associate judge (1983-88) and Chief Judge (1988 to present), D.C. Court of Appeals, 500 Indiana Av., N.W., Washington, D.C. 20001.

- b. 1. What has been the general character of your law practice, dividing it into period with dates if its character has changed over the years?

1965-1969: Trial Litigator. As an Assistant United States Attorney for three years, I prosecuted criminal cases in the District's trial court on almost a daily basis and handled civil proceedings in the United States District Court on almost a weekly basis. As a trial attorney in a legal services program for under a year, I represented individual clients in state administrative hearings and civil proceedings and also worked with several lawyers in representing a community organization in a class action suit in the federal district court.

1969-1979: Legislation. During these years I worked principally on legislation of all types, in Congress and the Council of the District of Columbia. At the Justice Department I worked on the legislation to create the District's current state-type court system. In the District government, I worked on the congressional legislation to create the current form of local government in the District of Columbia. My experience spanned

the development of legislation through intra-agency and inter-agency review with local and federal departments and agencies, drafting and review and preparation of testimony and legislative reports, and work with congressional and Council committees.

1979-1983: Corporation Counsel for the District government. Like a state attorney general, I was actively involved in the development of legal strategy and legal positions, formal legal opinions, regulatory review and advice, review of appellate briefs as well as staff management, training, fiscal and budget issues. Congressional contacts continued as a result of legislative work and congressional review of budget requests.

1983 to present: Appellate Judge. After serving for five years as an Associate Judge on the District's highest court, I was selected, by a seven-member Nomination Committee, to be the Chief Judge. After serving a four-year term as Chief Judge, the Nomination Commission appointed me to serve a second four-year term as Chief Judge. While serving as Chief Judge, I have continued to carry the full workload of an associate judge in addition to performing my responsibilities for administration of the appellate court and as chair of the Joint Committee on Judicial Administration, the policy making body of the District of Columbia Court system.

During my service as Chief Judge, the D.C. Court of Appeals has adopted and implemented a case management program, added calendars, made greater use of senior judges, streamlined procedures, and increased productivity. In response to four independent studies, and upon exhausting alternative solutions, I worked closely with the Bar and other groups on congressional legislation to establish an intermediate appellate court. I served on the Conference of Chief Justices and was elected to its Executive Committee in August 1993.

While chairing the Joint Committee on Judicial Administration, the District of Columbia courts have, among other things, adopted new personnel standards, developed alternative compensation packages, and obtained increased funding for the Judicial Branch of the District government. The latter occurred with the assistance of the Bar, which I sought out in speeches and meetings, and resulted in testimony and letters as well as the preparation of a white paper by the D.C. Bar on the need for adequate funding of the courts. Also, of significance, under my leadership the Joint Committee established task forces to examine gender and racial and ethnic bias in the courts and thereafter implemented recommendations to address bias in the courts. See *Annual Report of the District of Columbia Courts*, at Tab 4.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

My professional career has been devoted to public service. With very brief exceptions I have worked for either the federal or the District governments. Hence, my clients have been the government, and its departments, agencies, boards and commissions. As a legal services attorney, I represented individual clients, including a community organization seeking injunctive relief in federal court and individuals seeking state administrative remedies.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each variance, giving dates.

1965-68: in court regularly

1979-83: very rarely

2. What percentage of these appearances was in:

(a) federal courts:

100 percent 1967-68

50 percent 1979-83

(b) state courts of record:

100 percent 1965-66

50 percent 1979-83

(c) other courts:

None.

3. What percentage of your litigation was:

(a) civil:

40 percent 1966-68

100 percent 1979-83

(b) criminal:

60 percent 1966-68

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

As a prosecutor representing the United States, I conducted misdemeanor prosecutions in 1965-66 on almost a daily basis. I conducted forty-one jury trials in misdemeanor prosecutions in addition to numerous trials and motions argued before the court. From 1967-68, I handled numerous civil matters

in the federal district, including civil commitment cases where there were jury trials nearly every week. In addition, I prepared pleadings and argued motions in extradition cases, collateral attacks on criminal convictions, and responded to petitions for writs of habeas corpus.

5. What percentage of these trials was:

- (a) jury:
- (b) non-jury:

Working in a high volume prosecutor's office, I did not keep records of the percentages. The nature of the trials is described in response to question 4.

8. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Significant litigation in which I was involved as Corporation Counsel included litigation (1) testing the scope of delegated powers of the new home rule government; (2) land use within historic districts; (3) the municipal corporation's liability for common law torts, medical malpractice, and constitutional violations; (4) contracts, personnel, and labor relations; (5) presentation and review of administrative proceedings; (6) prosecutions for minor misdemeanors, juvenile delinquency, child abuse and neglect as well as regulatory violations; and (7) enforcement actions to collect child support as well as taxes and other funds owed to the District government. See *Annual Reports of the Office of the Corporation Counsel*, at Tab 3. Significant matters include:

Taxing power: As Corporation Counsel, I presented the District government's argument before the en banc court in *Bishop v. District of Columbia*, 411 A.2d 997 (D.C. 1980) (en banc), cert. denied, 446 U.S. 966 (1980). The case involved the taxing authority of the new home rule government. The Council of the District of Columbia had enacted legislation to repeal an exemption for lawyers and other professionals from the D.C.

franchise tax on unincorporated business. A three-judge division of the Court held that the legislation exceeded the powers of the D.C. Council under the D.C. Self-Government and Governmental Reorganization Act of 1970. The en banc Court agreed to rehear the case. I presented additional arguments based on the provisions and legislative history of the D.C. Income and Franchise Tax Act of 1947, which distinguished between the proscribed commuter tax on personal income ("income taxes") and an unincorporated business franchise tax. The en banc Court nevertheless concluded that the Council had exceeded its authority.

Attorneys of record: John M. Bixler, Esq., 655 15th Street, N.W., Washington, D.C. 20005 (202-626-5800), with Ronald D. Aucutt, Esq., of the same address and telephone number; Phillip L. Kellogg, Esq., 1275 K St., N.W., Washington D.C., 20005 (202-898-0722), with James L. Lyons, Esq., of the same address and telephone number.

Other examples of significant litigation in which I had a direct supervisory role:

Personnel authority: Barry et al. v. Public Employee Relations Board, et al., No. C.A. 15364-80 (D.C. Superior Court, June 30, 1981), appeal *American Federation of Govt Employees v. Barry, et al.*, 459 A.2d 1045 (D.C. 1983). This case involved the scope of the District government's authority to establish a personnel system that was independent of the personnel system for federal government employees. Section 422(3) of the D.C. Self-Government and Governmental Reorganization Act required the District government to establish its own personnel system, but also required that the new system include benefits "at least equal to" those previously provided by Congress for District government employees. I recommended that the District government file suit after the Public Employee Relations Board issued an opinion requiring collective bargaining to set certain cost-of-living increases, thereby purporting to limit the Mayor's authority under the newly enacted D.C. personnel law. The District government's motion for summary judgment was granted by the trial court. The work in this case provided the basis for the District government's position in two other cases where District government employees raised the "at least equal to" claim. See *Concerned Court Employees et al. v. Polansky, et al.*, No. 81-1035 (D.C. Super. Ct. Jan. 29, 1982); on appeal: 478 A.2d 1096 (D.C. 1984); *Thomas et al. v. Barry, et al.*, No. 92-1920 (D.C. 1982), on appeal: 234 U.S. App. D.C. 370, 729 F.2d 1469 (1984).

Attorneys for the Board: Thomas H. Queen, Esq., 530 8th Street, S.E., Washington, D.C. 20003 (202-544-4200).

Attorneys for the Union Coalition, which intervened in

support of the Board: A.L. Zwerdling, Esq. (deceased) and Wendy L. Kahn, Esq., then at 1730 K Street, N.W., Suite 713, Washington, D.C. 20006 (unlisted in the 1993 *Legal Register*).

Scope of the initiative power: *Convention Center Referendum Committee, et al. v. D.C. Bd. of Elections & Ethics*, 438 A.2d 132 (D.C. 1981) (en banc). This case presented issues relating to the respective authority of the Mayor, the Council of the District of Columbia, and the Congress where the electorate, acting through a citizen initiative, sought to prevent construction of a convention center. Congress had appropriated the funds requested by the Mayor and Council for construction of the convention center. The litigation arose when the Board of Elections rejected a proposed initiative to stop construction of the center. The trial court agreed with the Board, but suggested what might be a proper initiative. A second initiative was also rejected by the Board. The trial court denied the plaintiffs' motion for declaratory relief and they appealed. A three-judge division of the D.C. Court of Appeals affirmed the trial court. The en banc court reheard the case.

The District government's initial brief focused on the distinction between "legislative" and "administrative" matters as a basis for a narrow reading of the initiative. This approach conflicted with the District government's position that Congress intended a broad delegation of legislative authority to the home rule government. The revised brief avoided a restrictive interpretation of the Council's delegated powers.

Attorneys for the plaintiffs: Williams F. Schultz, Esq., Diane B. Cohen, Esq., and Alan B. Morrison, Esq., 2000 P Street, N.W., Washington, D.C., Washington, D.C. 20036 (202-833-3000)

Attorneys for amici: James H. Heller, Esq., 1275 K Street, N.W., Washington, D.C. 20005 (202-898-4800), and Arthur B. Spitzer, Esq., 1400 20th Street, N.W., Washington, D.C. 20036 (202-457-0800); Stephen Truitt, Esq., 1300 19th Street, N.W., Washington, D.C. 20036 (202-828-1452), and Deborah Calloway, Esq. (unlisted in 1993 *Legal Register*), Jerry A. Moore III, 800 K Street, N.W., Washington, D.C. 20001 (202-408-3220), and J. Kirkwood White, Esq., 2100 Pennsylvania Av., N.W., Washington, D.C. 20037 (202-881-1460).

Attorney for the Board of Elections and Ethics: William H. Lewis, 441 Fourth Street, N.W., Washington, D.C. 20001 (202-727-2194).

Constitutional practices: *Morgan et al. v. Barry, et al.*, 596 F. Supp. 879 (D.D.C. 1984). This class action suit sought injunctive relief against strip and squat searches and spraying of females arrested and temporary detained at the D.C. Jail, and the

practice of holding males and females in inadequately ventilated vans. In response to the plaintiffs' first demand, the District government entered into an agreement to stop such searches in the absence of probable abuse to believe the arrestee had weapons, drugs, or other contraband on her person. The District was facing the likelihood of a court order that it had violated an order entered in *Langley v. Washington*, No. 75-2058 (D.D.C. Dec. 23, 1975). The second demand, involving the vans, resulted in lengthy negotiations. But early resolution of the first demand resulted in the almost immediate cessation of the general practice of strip and squat searches of females awaiting arraignment.

Attorney for the plaintiffs: Arthur Spitzer, Esq., 1400 20th Street, N.W., Washington, D.C. 20036 (202-457-0800); Nina Kraut, Esq., 3815 Yuma Street, N.W., Washington, D.C. 20016 (202-745-0300).

Scope of District government's public duty: *Warren et al. v. District of Columbia*, 444 A.2d 1 (D.C. 1981) (en banc). This case involved the public duty doctrine, arising in a negligence action brought by two women who were assaulted in their home after the police failed to respond to their telephone calls. A three-judge division of the D.C. Court of Appeals reversed the trial court's dismissal of the complaint for failure to state a cause of action. The en banc court concluded, however, that a special relationship did not arise as a result of the promise of the police to respond.

Attorney for plaintiffs/appellants: Steven A. Friedman, Esq., 6404 Ivy Lane, Greenbelt, Md. 22701 (301-220-2200).

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

As Corporation Counsel for the District government, I was involved in developing the government's legal position in a large number of cases. This occurred at a significant time, shortly after the home rule government was formed, when it was testing the scope of the powers delegated to it by Congress. Having worked on the legislation that created the new form of local self-government, I was in an almost unique position to guide the District's legal response.

This was accomplished through weekly meetings with Division Deputies, who also submitted monthly litigation reports, and meeting on nearly a daily basis with supervising Deputies and

trial attorneys as well as the affected department officials and administrative agencies to develop the District government's litigation strategy. In addition, I reviewed and edited pleadings and briefs. I was fortunate, as well, to have the assistance of very able attorneys, including Deputies whom I recruited or promoted from within the ranks.

Such joint efforts enabled the District government to prevail at times when it otherwise might not have prevailed, *see, e.g., Convention Center Referendum Committee et al. v. D.C. Bd. of Elec. & Ethics, et al.*, 438 A.2d 132 (D.C. 1981) (en banc), or forestalled having harsher judgments entered against the government. *See, e.g., Morgan et al. v. Barry et al.*, 596 F. Supp. (D.D.C. 1984) (strip and squat searches of female prisoners). Most significantly, it enabled the new home-rule District government to effectively present its position, consistent with congressional reservation of certain powers and constitutional responsibilities, that the congressional delegation of the authority under the D.C. Self-Government and Governmental Reorganization Act of 1973, Pub. L. 93-198, was intended to be broadly construed.

Attachments (Tabs 1, 2, 3 & 4)

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employees, clients or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

I will receive an annuity from the District government as a result of more than ten years of judicial service.

2. Explain how you will resolve any potential conflicts of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial relationships that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

Consistent with federal law and the Code of Conduct for United States Judges, I will continue my practice of recusing myself in any case in which I have a financial interest in a party. I will also recuse myself for two years from sitting on any case involving the District of Columbia courts or court employees, as well as from cases involving those courts and employees that arose while I was a District of Columbia judge.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

I have no such plans, commitments or agreements.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more. (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See Tab 5.

5. Please complete the attached financial net worth statement in detail.

See Tab 6.

6. Have you ever held a position or played a role in a political

campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I was a volunteer in several Democratic presidential campaigns during periods when I was not otherwise employed: 1968: Humphrey-Muskie; 1972: McGovern-Eagleton.

Attachments (Tabs 5 & 6)

Sources of Income 1992-93

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more. (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

Sources of all income received in 1992 and 1993

Calendar 1992

Judicial Salary: \$130,087.40

Investment income:

IBM sh.	\$1,077
Waste Mgmt sh.)	\$319
Phillip Morris sh.)	
Prudential Bank	\$994
Am. Sec. Bk	\$846
Citibank	\$2,967
Second Nat. Fed.	
Sav. Bk	\$2,552
Meritor Sav. Bk	\$7,560
Crestar Bk	\$1,885
Nat. Trust Group	\$436

Calendar 1993

Judicial Salary
(to 12-11-93) \$142,032.32

Investment Income:

Phillip Morris sh.)	\$277
Waste Mgt (now)	
WMX Techs))	
Nat. Trust Group	\$2,534.90
Reinvested, in	
unlisted securities	
(see schedule	
attached, at	
Tab 6)	

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETSLIABILITIES

Cash on hand in banks		No debts, mortgages,
Crestar Bank	\$29,738	loans or other
Citibank	\$32,419	financial obligations
U.S. Government Securities:	none	
Unlisted Securities	\$499,590	
(see attached schedule)		
Accounts and notes		
receivable	none	
Real Estate owned:		
111 Third St., N.E.		
(1993 assessed value)	\$332,780	
Real Estate mortgages		
receivable	none	
Autos and other personal property		
1985 Toyota Corolla		
estimate:	\$3,000	
household furnishings:		
estimate:	\$10,000	
Cash value - life insurance	\$0	
Other assets: itemize:		
Judicial Retirement		
contributions	\$109,214	
Total Assets	\$1,016,741	Total Liabilities: \$0
		Net worth \$1,016,741

Total liabilities
and net worth:
\$1,016,741

CONTINGENT LIABILITIES

None

GENERAL INFORMATION

No assets pledged.

I am not a defendant in any suits or legal actions, with the possible exception of any pending lawsuit against the Court that names me in my official capacity as a judge of the D.C. Court of Appeals.

I have never declared bankruptcy.

Unlisted Securities

Schedule¹

1. Bond Accounts

AIM Ltd. Mat. Treas.	\$61,492
Calvert Tax-Free Resvs.	\$43,100

2. Stock Accounts

American Funds:	
Investment Co. Amer.	\$112,603
Washington Mutual Inv Fd	\$88,414
New Perspective Fd	\$51,435
Growth Fd America	\$54,462

3. Balanced Accounts

Defrd Incm-Lincoln	
Nat Managed Fd	\$62,340
IRA Incm Fd America	\$25,744

TOTAL	\$499,590
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¹ Figures based on latest 1993 reports

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

1972-74: Member of the Board of Directors of Wider Opportunities for Women. This organization developed training programs to assist poor, mostly minority, women in gaining skills so that they could become gainfully employed. Meetings on approximately a monthly basis.

1972-74: Member of the Friends of the D.C. Superior Court. This organization developed and ran a child care center for parents who were involved in court proceedings and had no where else to leave their children. Meetings held approximately every other month.

1979-83: As Corporation Counsel, 1979-83, I met with numerous community groups and a variety of persons, most frequently at night and on weekends, to understand how the District's legal office could respond more effectively to concerns of the disadvantaged. Such meetings, for example, led to my testimony in support to legislation to improve police response to domestic violence and work to improve the Citizens Complaint Center. Also, working with representatives of the United States Department of Health, Education and Welfare, I established a child support enforcement section, resulting in increased collections. I also took steps to ensure that greater efforts were made in the areas of child abuse and neglect as well as in the prosecution of absentee slum landlords. To ensure continued responsiveness to the concerns of the disadvantaged, I also recruited lawyers who had worked in legal services programs.

1982-90: Trustee at Radcliffe College (1982 to 1988) and a member of the Visiting Committee at Harvard Law School (1984 to 1990). I urged the expansion of financial aid programs so that disadvantaged youngsters would be able to attend these schools and so that their graduates could afford to work in the public sector.

1988 to present: As Chief Judge and Chair of the Joint Committee on Judicial Administration (the policy-making body of the District of Columbia courts), I proposed and established task forces on gender and racial and ethnic bias in the courts. Although a number of state court systems had conducted gender bias studies, and a few had undertaken racial bias studies, only

the District of Columbia courts pursued both areas simultaneously. This arose from my understanding that in urban courts gender issues, particularly as they affect the disadvantaged seeking relief in the courts, often involve issues of race and ethnicity, and vice versa. Because the sources of the biases are different, however, separate task forces were needed. But, by working simultaneously, and holding some joint public meetings, the task forces produced a Final Report with a comprehensive series of recommendations. I arranged for the Annual Judicial Conference of the judges and the Bar to pursue the issues presented in the Final Report. Thereafter, I contacted task force members to serve on an advisory committee to assist the Joint Committee in overseeing implementation of the recommendations. One year after receiving the Final Report, the Joint Committee issued a report demonstrating major accomplishments in implementing the task forces' recommendations. See *Annual Report of the District of Columbia Courts*, at Tab 4.

As Chief Judge, in addition to making numerous speeches in the community, I have also participated in the annual law day programs involving high school students from public and private schools.

2. The American Bar Association's Commentary on its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

I do not belong, nor have I belonged, to such organizations.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

There is no selection commission in the District of Columbia to recommend candidates for nomination to the U.S. Court of Appeals for the District of Columbia Circuit.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain.

No such discussion has occurred.

5. Please discuss your views on the following criticism involving "judicial activism":

"The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities."

The Judicial Branch must respect the roles of the Executive and Legislative Branches. The principle of separation of powers is fundamental to our system of government. Cases and controversies are to be decided by the courts. Hence, parties must properly be before the court and the issues must be ripe for decision. The criticism of "judicial activism" is to be distinguished, however, from matters that are properly before the court where the appropriate disposition of the case or controversy may have far-reaching consequences. My experience indicates that judges are loath to assume administrative responsibilities much less impose broad affirmative duties on government and society that exceed the requirements of law in the case pending before the court.

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full name (include any former names used.)**

Michael A. Ponsor

2. **Address: List current place of residence and office address(es).**

Home: 387 Bay Road
Amherst, MA 01002

Office: U.S. District Court
1550 Main St., Rm. 512
Springfield, MA 01103

3. **Date and place of birth.**

August 13, 1946. Chicago, Illinois.

4. **Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**

Divorced.

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

Yale Law School: 1971-73, 1974-75; J.D., January 1975.

Pembroke College, Oxford University, England: 1969-71; B.A. (second class honours), June 1971; M.A., March 1979.

Harvard University: 1964-67, 1968-69; B.A. (magna cum laude), June 1969.

6. **Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.**

January 1984 to present: United States Magistrate Judge,
U. S. District Court, Springfield, Massachusetts.

January 1988 to present: Professor of Law (Adjunct), Western
New England College Law School, Springfield, Massachusetts.

January 1989 to 1991: Professor of Law (Adjunct), Yale Law School, New Haven, Connecticut.

September 1978 to December 1983: Partner, Brown, Hart & Ponsor, 35 South Pleasant St., Amherst, Massachusetts.

September 1976 to September 1978: Associate, Homans, Hamilton & Lamson, 1 Court St., Boston, Massachusetts.

September 1975 to September 1976: Law Clerk, Hon. Joseph L. Tauro, U. S. District Court, Post Office & Courthouse, Boston, MA.

Summer 1974: Summer clerk, Hill & Barlow, Boston, MA

Summers 1969 and 1971: General assignment reporter, Minneapolis Tribune, Minneapolis, MN

July 1967 to August 1968: Teacher, Kenya Institute of Administration, Nairobi, Kenya (on leave from Harvard).

7. Military Service: Have you had any military service? If so, give particulars, including dates, branch of service, rank or rate, serial number and type of discharge received.

None

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Rhodes Scholarship

Dean's List, all years at Harvard.

Honorary Scholarships for academic excellence, all years at Harvard.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

American, Massachusetts, Hampshire County and Boston Bar Associations. National Council of United States Magistrate Judges.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

I belong to no organizations actively lobbying before public bodies. Other organizations I belong to are:

American Field Service;
 Association of American Rhodes Scholars;
 Oxford Society;
 United State Magistrate Judges Association;
 The Finnish-American Society.
 South Congregational Church

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

United States Supreme Court, 1980
 Massachusetts Supreme Judicial Court, 1975
 U. S. Circuit Court of Appeals, First Circuit, 1976
 U. S. District Court, District of Massachusetts, 1976

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

I am currently co-editor of an updated edition of Civil Litigation in the First Circuit, which will be published in 1994 by Massachusetts Continuing Legal Education. I will be writing two sections of the book: one on arguing motions (now in draft form), the other on special features of civil practice in the District of Massachusetts. A copy of my draft "Avoiding Catastrophe at Oral Argument" is included in my

Appendix as Section S.

A list of speeches and other presentations I have made is appended to this form as Attachment 1. I am not aware of any press coverage of these events. The presentations were not written, and I currently have no documents embodying them.

13. Health: What is the present state of your health? List the date of your last physical examination.

My health is excellent. My last physical exam was on 8/4/93.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I was appointed U.S. Magistrate Judge for the United States District Court for the District of Massachusetts (Western Section) on January 6, 1984 and reappointed to a second eight-year term on January 6, 1992. The Western Section exercises jurisdiction over all federal criminal and civil cases in the four counties of western Massachusetts.

As the Magistrate Judge in the Western Section, my responsibilities include: (1) review of all applications for search, seizure, arrest or inspection warrants in these counties; (2) arraignments, initial appearances and detention hearings in all criminal cases; (3) issuance of rulings on non-dispositive pre-trial motions in all criminal and civil cases; (4) issuance of reports and recommendations on dispositive motions in criminal and civil cases, following

conduct of evidentiary hearings, if necessary; (5) jury and non-jury trials in criminal misdemeanor cases and in civil cases, with the consent of the parties.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

(1) Ten Significant Opinions.

A. Gunther v. County of Franklin, C.A. 91-30108 (October 15, 1992). Report and Recommendation addressing the constitutional rights of inmates at correctional facilities suffering from HIV-related illnesses, and recommending that defendants' motion for summary judgment be denied. This recommendation has been adopted by Sr. Judge Frank H. Freedman on September 29, 1993. See Appendix A.

B. Mattoon v. Pittsfield, C.A. 88-0128-F (July 17, 1991). Report and Recommendation addressing the preemptive impact of the Safe Drinking Water Act, 42 U.S.C. § 300f, on plaintiffs' federal and state claims against the City of Pittsfield and others for an outbreak of waterborne giardiasis caused by beavers⁷³² in the city's reservoirs, recommending allowance of the defendants' motions for summary judgment. This recommendation was adopted by the district court and affirmed in

Mattoon v. Pittsfield, 980 F.2d 1 (1st Cir. 1992). See Appendix B.

C. Wilkes v. Heritage Bancorp C.A. 90-11151-F and 90-11285-F (November 21, 1990). Report and Recommendation addressing the sufficiency of a complaint against a bank for violations of sections 10b and 20 of the Securities Exchange Act of 1934, concluding that the allegations failed to state a claim under Fed. R. Civ. P. 12(b)(6) and, further, failed to satisfy the particularity requirements of Fed. R. Civ. P. 9(b), recommending that the complaint be dismissed without prejudice to a motion to amend. The recommendation was subsequently adopted by the district court in Wilkes v. Heritage Bancorp, Inc., 767 F. Supp. 1166 (D. Mass. 1991). See Appendix C.

D. Frazier v. Bailey, C.A. 89-30098 (December 14, 1990). Report and Recommendation addressing the entitlement of counsellors, social workers and other medical personnel involved in a child sexual abuse case to qualified immunity from claims brought under 42 U.S.C. § 1983 by the children's father, the purported abuser, alleging violations of his constitutional rights, recommending that defendants' motions for summary judgment be allowed. This report and recommendation was subsequently adopted by the district court and affirmed in Frazier v. Bailey, 957 F.2d 920 (1st Cir. 1992). See Appendix D.

E. Russell Harrington Cutlery, Inc. v. Lamson & Goodnow Mfg. Co., C.A. No. 89-01077 (Dec. 26, 1989). Memorandum and Order addressing plaintiff's claim that it possessed the exclusive right, under common law and statutory trademark, to manufacture white-handled knives in the United States and Canada, and recommending (with a bow to Moby Dick, and the "whiteness of the whale") that the defendants' motion for summary judgment be allowed, on the ground that, generally speaking, a manufacturer cannot obtain a trademark on a color. Since this was a consent case pursuant to Fed. R. Civ. P. 73, this ruling was the final order in the case. It was not appealed. See Appendix E.

F. Colon v. Casco, Inc., C.A. 86-0177-F (September 15, 1988). Memorandum and Order awarding damages to migrant workers for violations of the Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. § 1801, following a three-day trial under Fed. R. Civ. P. 73. On appeal, the district court, acting as a court of appeals, affirmed except for the issue of prejudgment interest, which was awarded on remand. The district court opinion is reported at 716 F. Supp. 688 (D. Mass. 1988). See Appendix F.

G. Rodriguez v. Springfield, 127 F.R.D. 426 (D. Mass. 1989). Memorandum and Order addressing the difficult issue of a civil rights plaintiff's entitlement to disclosure of the

identity of a confidential informant whose misinformation to the police regarding drug dealing led to a mistaken search of her apartment, balancing "with as much subtlety as the court can muster" -- Id. at 431 -- the plaintiff's right to this information to prosecute her claim of police misconduct, against law enforcement concerns about the protection of sources. See Appendix G.

H. M.S. Chambers & Son, Inc. v. Tambrands, Inc., 118 F.R.D. 274 (D. Mass. 1987). Memorandum and Order, adopted by then Chief Judge Freedman without objection, awarding defendants \$17,181.13 attorneys fees as a sanction pursuant to Fed. R. Civ. P. 11, against the plaintiff's attorneys for knowingly filing suit in an improper venue and prosecuting the suit under the name of a plaintiff they knew, or should have known, was not entitled to relief. At the time this was one of the stiffest sanctions under Rule 11 in this Circuit. See Appendix H.

I. Brown v. Ashe, C.A. 81-280-F. February 21, 1989. Memorandum and order capping the inmate population at the Hampden County Jail and House of Correction at 450. This order issued in response to a visit by the court to the century-old facility and the revelation that the institution, which had a rated capacity of 314, housed 724 prisoners. The cap remained in place until the fall of 1992, when the new

jail and house of corrections opened in Ludlow. All parties consented to trial of the case before me under Fed. R. Civ. P. 73. The order was not appealed. See Appendix I.

J. United States v. Joseph T. Keating, CR. 87-167-F. June 20, 1988. Report and Recommendation urging allowance of the defendant's motion to dismiss for improper destruction of evidence, violation of the Speedy Trial Act and prosecutorial vindictiveness. The basis of the recommendation was the misrepresentation to the court by the government that an 86-second gap in a tape recording of a conversation between a DEA agent and the defendant, which defendant claimed was exculpatory, was innocently caused by excessive distance between the transmitter and receiver. In fact, following this representation to the court, made by the agent under oath, an F.B.I. expert testified that the gap was caused by a deliberate erasure. The recommendation was adopted by the district court and the indictment was dismissed with prejudice. See Appendix J.

(2) Appellate Opinions.

A. Sweeney v. Westvaco Co., 926 F. 2d 29 (1st Cir. 1991). Plaintiff brought a loss of consortium action against her husband's employer and supervisors alleging negligent infliction of emotional distress. After a jury trial in which the plaintiff was awarded substantial damages, the defendant

moved for judgment n.o.v., and I allowed the motion, concluding that the suit was preempted under the Labor Management Relations Act, 29 U.S.C. § 185, and that the defendant had not waived the defense by failing to raise it before the verdict. The First Circuit affirmed my rulings against claims of trial-related errors, but -- while recognizing that the defendant's argument was "a strong one," Id. at 38 -- held that the defendant's failure to raise the preemption defense earlier constituted a waiver. The case was remanded with instructions to reinstate the jury's verdict.

B. Santiago v. Fenton, 891 F.2d 373 (1st Cir. 1989). Plaintiff brought a civil rights action under both 42 U.S.C. Section 1983 and state common law. Some claims and defendants dropped from the case following rulings on motions for summary judgment. At the close of the evidence I directed verdicts for the remaining defendant on the state tort claims and federal and state civil rights claims for false arrest and imprisonment, malicious prosecution, abuse of process and conspiracy, on the ground that the uncontested evidence demonstrated that the defendant had probable cause to arrest the plaintiff. The claim for excessive force went to the jury and resulted in a damage award to the plaintiff. On appeal, the First Circuit affirmed in part, but reversed the grants of directed verdicts on the state tort claims of false arrest and imprisonment, malicious prosecution and abuse of process, and

the state and federal civil rights claims for illegal arrest and civil rights conspiracy. The case was remanded for a new trial on these claims and subsequently settled.

C. Colon v. Casco, Inc., 716 F. Supp. 688 (D. Mass. 1989). This was an action brought under the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801, tried before me under Fed. R. Civ. P. 73 and 28 U.S.C. § 636(c). The parties opted to pursue their appeal before the district court under 28 U.S.C. § 636(c)(4). My findings and rulings were affirmed against a broad-based appeal by the defendants, but I was reversed on plaintiffs' cross appeal for denial of prejudgment interest. Id. at 695. The case was remanded for an assessment of prejudgment interest.

D. Librera v. United States, 718 F. Supp. 111 (D. Mass. 1989). Plaintiffs brought a slip-and-fall action against the United States under the Federal Tort Claims Act after a fall at the Shelburne Falls Post Office. Following a non-jury trial I awarded damages in the amount of \$124,151.82. As with Colon above, the case was tried before me by consent with the appeal to go to the district court. In an unpublished opinion dated October 24, 1988 the district court affirmed "substantially all" of my decision, but remanded for further findings, regarding "the respective liabilities of the United States and Corliss [a private contractor, whose negligence

arguably contributed to plaintiff's injury], and for a reduction in the award if appropriate." Id. at 112. On December 8, 1988 I issued my Memorandum on Remand finding that the plaintiff's injury was indivisible, that the United States was itself negligent, that this negligence was a substantial factor in causing the plaintiff's injury and that, as a result, the United States was jointly and severally liable for the entire damage award. This decision was affirmed by the district court on appeal in the ruling cited above.

The four cases summarized above are the only appellate opinions where my decisions were reversed or significantly criticized.

(3) Significant Opinions on Constitutional Issues.

A large percentage of the recommendations I have rendered since 1984 have touched on constitutional issues the parties, at least, deemed significant. The Gunther, Frazier and Keating cases at Appendix A, D and J are examples of these. Hundreds more rulings on non-dispositive motions, particularly in criminal cases, were drafted against a backdrop of constitutional law. See e.g. Rodriguez v. Springfield, 127 F.R.D. 426 (D. Mass. 1989) and United States v. Noetzel, 124 F.R.D. 518 (D. Mass. 1989). The following are significant opinions on constitutional issues.

A. United States of America v. Yang Il Kim, CR. 85-0151-F. October 24, 1985. The court recommended allowance of defendant's motion to suppress on the ground that the government investigators had deliberately withheld Miranda warnings in an effort to intimidate the defendant into making incriminating statements. The defendant pled guilty while the government's objections to this recommendation were pending. See Appendix K.

B. United States of America v. Single Family Dwelling, C.A. No. 85-0246-F (November 26, 1986). This memorandum recommended the dismissal of ten civil forfeiture actions on the ground that the procedure was unconstitutional as applied, or alternatively, that the practices employed by the government in effecting the forfeitures were so flawed that dismissal was appropriate. The recommendation was adopted by the district court, and all the complaints were dismissed. Although the discussion in the memorandum is somewhat anachronistic now, given subsequent refinements in procedures, at the time it offered one of the first constitutional analyses of civil forfeiture. See Appendix L.

C. United States of America v. Scibelli, CR. 85-0399-F. August 13, 1987. This recommendation urged denial of defendant's broad-ranging motion to suppress electronic surveillance at his place of business. It addressed a number of possible grounds for suppression of the fruits of electronic surveillance. The recommendation was adopted by the district court and the defendant

eventually pled guilty. See Appendix M.

D. Plathe v. Coggins, C.A. 86-0273-F. July 11, 1988. This recommendation offers an instance in a civil rights case alleging police misconduct, where the court found that the reasonableness of the force used did not raise a jury question. Defendant was a female state trooper confronting the plaintiff, a much larger male who admitted resisting arrest. She incapacitated him with a single blow to the groin with her flashlight in order to apply handcuffs.

Plaintiff suffered no injury beyond the initial shock, and the court found the force reasonable as a matter of law. The recommendation was adopted by the district court and summary judgment was entered for the defendant. See Appendix N.

E. United States of America v. Hadfield, CR. 88-0254-F. March 8, 1989. This recommendation found that defendants had made a sufficient preliminary showing, pursuant to Franks v. Delaware, 438 U.S. 154 (1978), that false statements were contained in the search warrant supporting the search of their residence, and an evidentiary hearing was appropriate. The government objected to the recommendation and submitted additional material to the district court on review de novo that persuaded Judge Freedman not to adopt the recommendation. This decision was later affirmed at 918 F. 2d 987 (1st Cir. 1987), cert. denied 111 S. Ct. 2062 (1991). See Appendix O.

F. Kucefski v. Desy, C.A. 89-30167-F. October 8, 1992. This memorandum discusses the elements of a claim for false arrest and, more significantly, at 12 et seq., the allegations required for a claim of civil rights conspiracy under 42 U.S.C. section 1985. The recommendation also discusses the factual prerequisites for a claim under the Massachusetts Civil Rights Act. It recommends that summary judgment be granted as to the claim for false arrest and otherwise denied. The recommendation was adopted by the district court on October 30, 1992. See Appendix P.

G. Smith v. Springfield, C.A. 88-0165-F. October 13, 1992. The recommendation addresses a claim under 42 U.S.C. sections 1983 and 1985 for civil rights violations arising from a "protective sweep" by federal state law enforcement officers of the plaintiff's residence. The memorandum incorporates a previous report, dated March 2, 1990, addressing the claims of excessive force and rejecting the defendants' claims of qualified immunity. This recommendation was adopted by the district court on September 24, 1993. See Appendix Q.

H. Pyle v. The South Hadley School Committee, C.A. 93-30102-F. June 8, 1993. Plaintiff high school students sought a temporary restraining order barring any attempt by the defendant School Committee to prohibit them from wearing two mildly vulgar T-shirts in school. The court denied the motion, concluding that the plaintiffs were unlikely to prove a First Amendment violation based

upon the defendants' decision to limit clothing with sexually provocative slogans, where affidavits from the teachers suggested that such limitation protected students and enhanced the learning environment. This was a consent case under Fed. R. Civ. P. 73; the denial of the T.R.O. was not appealable. See Appendix R.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

In 1979 I was appointed the Monitor to oversee implementation of the consent decree entered in Brewster v. Dukakis, C.A. 76-4423-F. I served until the end of 1983.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge and if so, the name of the judge, the court, and the dates of the period you were a clerk;
2. whether you practiced alone, and if so, the addresses and dates;
3. the dates, name and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

I clerked for U.S. District Judge Joseph L. Tauro in Boston, 1975-76.

Following my clerkship, I worked as an associate at a firm then named Homans, Hamilton and Lamson, 1976-78, located at One Court St., Boston. From 1978 until 1983 I was a

partner at Brown, Hart and Ponsor, 37 S. Pleasant St., Amherst, Massachusetts. In January of 1984 I was appointed to my present position. I have never practiced alone.

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?
2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

From 1976 to 1978 criminal defense work predominated, through my association with William P. Homans, Jr. As a result, I assisted in felony trials in state and federal court, including cases involving charges of arson, fraud, rape, armed robbery and assault. I exercised sole responsibility for a number of state district court trials, including assault and battery on a police officer, breaking and entering, possession of stolen goods, larceny and driving under the influence. My clientele was mainly individuals of very modest means or, by appointment, indigent persons. Another element of my practice was plaintiffs' civil rights litigation. These clients included a group of students asserting claims against Boston University for suppressing their newspaper, and union organizers contesting unfair labor practices and intentional infliction of emotional distress.

Following the move to Amherst in 1978 my practice gradually became more civil, though I still occasionally

represented clients charged in criminal cases in federal and state court. Plaintiffs' personal injury litigation began to absorb more of my time, and I developed a brisk domestic practice. Mine was a rewarding small-town practice, and my typical clients were individuals charged with crime, negligently injured or in the grip of matrimonial difficulties. Other clients were local businesses as well as Hampshire College, which I represented in disputes with its faculty.

Beginning in 1979, at the suggestion of now Superior Court Judge Catherine White, who was then representing the Commonwealth, and with the approval of plaintiff's counsel, I was appointed by the U.S. District Court the Monitor for the Brewster v. Dukakis consent decree. While the decree was very elaborate, it essentially called for a gradual reduction in the patient population of the Northampton State Hospital and the transfer of patients into smaller, community-based treatment facilities. My responsibilities included overseeing implementation of the decree to insure its provisions were carried out, particularly those aimed at patient safety and care; reporting to the court on the progress of implementation; resolving disputes between counsel for the plaintiff patients and the Commonwealth, and advising the court when unresolved disputes broke into active litigation. After my appointment this work occupied a third to a half of my professional life.

Since January of 1984, I have performed my duties as a Magistrate Judge.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

During 1976-78 in Boston, I typically appeared in court one or more times per week for hearings or trials. From 1978 to 1984 the frequency of my appearance varied but on the average I was in court two or three times a month for either a trial, conference or hearing.

2. What percentage of these appearance was in:

- (a) federal courts;
- (b) state courts of record;
- (c) other courts.

Approximately eighty percent of these appearances were in state courts of record, the balance in federal court.

3. What percentage of your litigation was:

- (a) civil;
- (b) criminal.

From 1976-78, when I practiced in Boston, eighty percent of my litigation was criminal; after my move to Amherst, about eighty percent of my litigation was civil.

4. State the number of cases in courts of record you

tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

My best estimate is that during 1976-78 while in Boston I tried approximately six major felony cases to judgment either in federal court or in state Superior Court, always as associate counsel. During the same period, I tried as sole counsel approximately five misdemeanor cases to verdict in various state district courts. Following my move to Amherst, I tried two major felony cases to verdict in federal court, one as associate counsel, and one -- a three-week trial -- as sole counsel. I tried a felony case to verdict in Superior Court as sole counsel, a misdemeanor case to verdict in Hampshire district court as sole counsel and at least two civil cases to verdict in Hampshire district court as sole counsel.

5. What percentage of these trials was:

- (a) jury;
- (b) non-jury.

In cases going to verdict approximately sixty percent have been jury trials, the balance non-jury.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;

(b) the name of the court and the name of the judge or judges before whom the case was litigated; and

(c) the individual name, addresses and telephone numbers of co-counsel and of principal counsel for each of the other parties.

It is difficult to address this question at the level of detail requested, because it seeks information from the time of my law practice, ten or more years ago. The following is my best effort, organized chronologically.

A. Commonwealth v. Edwin Gumbs. Docket number unknown. Along with William P. Homans, Jr. (now of 215 First Street, Cambridge, MA 02142), I represented the defendant on a charge of arson before a jury in the Suffolk Superior Court in roughly 1977. I do not recall the judge, but the prosecutor was Sandra L. Hamlin, now a Superior Court judge, New Court House, Pemberton Square Boston, MA 02108. The trial resulted in an acquittal. I assisted throughout the preparation and trial of the case but did not conduct direct or cross-examination.

B. Commonwealth v. Richard Liebman. Docket number unknown. Again, along with Attorney Homans I represented the defendant, an attorney charged with masterminding a robbery. The case was tried to a jury in Middlesex Superior Court before Judge Alan J. Dimond during the winter of 1977-78. The

prosecutor was John K. Markey, now of One Financial Center, Boston, 617-542-6000. The trial resulted in a conviction, later reversed on appeal. Commonwealth v. Liebman, 388 Mass. 483, 446 N.E.2d 714 (1983). I assisted throughout the preparation and trial of the case but, as in the Gumbs case, did not actively participate at the trial itself.

C. United States v. Curt Beck. Crim. No. 78-327-F. My client was charged under a federal indictment with participating, along with others under the direction of swindler and escaped convict Alan Herbert Abrahams, in a fraudulent investment scheme. I was sole counsel for Beck in the case, which was tried to a jury in the fall or early winter of 1978 before U.S. District Court Judge Frank H. Freedman in Springfield. The defendant pled guilty after 14 days of trial, subsequently shot himself -- fortunately not fatally -- and eventually received a term of probation with substantial community service. His co-defendants all went on to be convicted. The prosecutor was then Assistant U.S. Attorney Michael A. Collora, now at 400 Atlantic Avenue, Boston, (617) 357-9202. Pre-trial proceedings were extensive. See United States v. Abrahams, 466 F. Supp. 552 (D. Mass. 1978). Counsel for co-defendants included Andrew H. Good, now of 89 Broad St., Boston, 617-542-6663; Anthony M. Cardinale, One Commercial Wharf, Boston, 617-523-6163, and Robert F. Peck Jr., 265 Essex, Salem, 508-744-8180.

D. United State v. Daniel Meehan. Docket number unknown.

My client, a Pittsfield banker, was charged under a federal indictment with extorting money from loan applicants. The case was tried to a jury before U.S. District Court Judge Frank H. Freedman in Springfield, Massachusetts, in approximately 1980. I assisted in the preparation of the case and handled some cross examination at trial, though the lion's share of the work at the trial itself was performed by William P. Homans, Jr. The prosecutor was Assistant U.S. Attorney George F. Kelly, now at 1500 Main St., Box 15389, Springfield, Mass. 01115, (413) 781-4700. The trial resulted in a conviction.

E. Commonwealth v. Justin Gordon. Docket number unknown.

My client, a University of Massachusetts undergraduate, was charged with assault with intent to commit rape. The case was tried to a jury in the Hampshire Superior Court before Judge John F. Moriarty in the fall of 1980. I was sole counsel. The prosecutor in the early stages of the case was Edward F. Berlin, later my law partner and now an assistant attorney general heading the western Massachusetts office at 436 Dwight St., Springfield, Mass., (413) 784-1240. At trial the assistant district attorney was John Landes, who has moved from the area. The result of the trial was a conviction, vacated by Judge Moriarty as against the weight of the

evidence. Prior to a new trial my client was placed on unsupervised probation.

F. B. U. Exposure v. John Silber. Docket number unknown. I represented a group of Boston University students who published an undergraduate newspaper called the B.U. Exposure, after their funding was cut off when they published an article embarrassing to the B.U. administration. The complaint was filed, I believe, in the Middlesex Superior Court and sought a preliminary injunction mandating the release of the funds for the paper. Counsel for Boston University was James N. Esdaile, Jr., now at 75 Federal St., Boston, 02110, (617) 482-0333. A lengthy preliminary injunction hearing occurred in 1978 before Superior Court Judge Dimond, with testimony lasting almost an entire day, and resulting in denial of the motion for preliminary relief. Upon my move to Amherst, the case was taken over by the Massachusetts Civil Liberties Union.

G. Frado v. Murphy. Docket number unknown. My client was sued for overcharging the plaintiff for the repair and refurbishing of his vintage Volvo two-seater. The case was tried, jury-waived, over a number of days before Judge Alvertus Morse, in the Northampton District Court in 1981 or 1982. Various experts were presented on both sides regarding the value of the services performed by my client for the

plaintiff. Opposing counsel was Edward D. Etheridge, now at 64 Gothic St., Northampton, MA 01060, (413) 584-0368. The result was a verdict for the plaintiff.

H. Commonwealth v. Shanahan. Docket number unknown. I represented an undergraduate charged with assault and battery on a police officer at the University of Massachusetts. The trial took place in 1981 or 1982, non-jury, in the Northampton District Court before Judge Kramer. The assistant district attorney was W. Michael Goggins, now at One Court Square, Northampton, MA 01060, (413) 586-9225. The result was an acquittal.

I. Cave v. Cave. Docket number unknown. I represented an Episcopal minister through a particularly tangled domestic proceeding in an attempt to get custody of his four-year-old son, Daniel, who was taken out of the jurisdiction by his mother. After a hearing in 1982 or 1983 before Judge Sean M. Dunphy of the Hampshire Probate court, the court issued an order granting partial custody to my client. The order was taken to the Appeals Court where Judge Charlotte A. Perretta reversed. Opposing counsel was Jonathan Souweine, now at 39 Main St., Northampton, MA 01060, (413) 584-7331.

J. Brewster v. Dukakis, C.A. 76-4423-F. From 1978 through 1983 I was the Monitor appointed by the U. S. District

Court to oversee implementation of a consent decree mandating the gradual reduction of the patient census at Northampton State Hospital through transfers to smaller, community-based treatment facilities. In addition to reporting on the progress of implementation, I was vigorously involved in mediating recurrent disputes among the parties during a very difficult period of transition, and working with the court when litigation erupted over unresolved issues. Counsel for the defendant Department of Mental Health was Richard Ames now of 80 Boylston St., Boston, MA 02116, (617) 482-5200 in coordination with a series of assistant attorneys general, the last being William L. Pardee, One Ashburton Place, Boston, MA 02108, (617) 727-1014. Counsel for the plaintiffs were Steven J. Schwartz and Robert D. Fleischner, both of the Center for Public Representation, 22 Green St., Northampton, MA 01060, (413) 586-6024. Upon my appointment as Magistrate in 1984 my duties were passed on to a new Monitor.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

Most Significant Legal Activities, Chronologically:A. The Legal Rights of the Mentally Ill.

During my second year in law school I coordinated the efforts of approximately six other law students in delivering a wide range of legal services to patients at Connecticut Valley Hospital. In 1976, Judge Tauro's view of the Monson State School permitted me to witness firsthand the substandard conditions then existing at that institution. Still later, while in private practice, I made numerous visits to Northampton State Hospital and to dozens of small treatment facilities for the mentally ill throughout western Massachusetts in my role as Monitor for the Brewster consent decree. These contacts made me, I believe, more alert to the vulnerability of under-served segments of our population, and to the challenges of protecting the rights of groups like the mentally ill.

B. Teaching the Law

It is a proper part of the "legal activity" of a judge to teach the law. Five semesters at Western New England College Law School and two semesters at Yale Law School have given me the chance not only to share my experience but to enjoy the "recharging" that accompanies contact with students. Less extended teaching opportunities, such as work in continuing legal education, at Harvard's Trial Advocacy Workshop and at

the Attorney General's Advocacy Workshop in Washington D.C., have generated the same benefits. As one of only two western Massachusetts members of the state Advisory Committee for implementation of the Civil Justice Reform Act a special responsibility to the bar here has fallen on me to participate in workshops presenting the particulars of this important evolution of federal practice. Finally, it is especially gratifying to be frequently selected as a trainer for my fellow Magistrate Judges. In the past two years alone, I have participated in programs on attorney/client privilege, summary judgment, settlement, and discovery disputes at five separate seminars in various parts of the country for Magistrate Judges.

C. Tenure as a Magistrate Judge

In January of 1984 at the time of my appointment as the first Magistrate Judge in Springfield, the Western Section had 836 pending civil cases. By the end of December 1992, the combined civil caseload for Senior Judge Frank H. Freedman and me was 341. While of course many factors contributed to this reduction, it has been a privilege to add to the court's resources and strengthen its ability to respond to the demands placed on it.

The Magistrate Judge plays a unique role in this part of the state, in some ways similar to that of a district court judge. Counsel have been much more likely here to consent to

trial of civil cases before the Magistrate Judge under Fed. R. Civ. P. 73. As a result civil jury and non-jury trials make up a large share of my work. In 1991 and 1992 I disposed of more civil cases by consent than all the other Magistrate Judges in Massachusetts combined. On the criminal side, no other Magistrate Judge is given responsibility as a matter of course to conduct evidentiary hearings on motions to suppress. Since 1984 over 700 written recommendations on dispositive motions, and literally thousands of rulings on non-dispositive motions in both civil and criminal cases, have issued over my signature.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

None, except that I have the option in the future, of taking partial reimbursement of my Federal Employee Retirement System contributions in lieu of an annuity.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts of interest during your initial service in the position to which you have been nominated.

No categories of litigation or financial arrangements are likely to present potential conflicts of interest. Since my appointment as Magistrate Judge in 1984 I have on a few occasions confronted situations where a conflict, or appearance of conflict, has arisen. My practice is to put the relevant facts on the record and hear from counsel. In nearly ten years, following the Code of Judicial Conduct, I have felt it necessary to recuse myself about four or five times.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

I will probably continue to teach one semester a year, one evening a week, with the permission of the Chief Judge of the First Circuit. Occasional, uncompensated continuing legal

education will also almost certainly remain a part of my professional life. I have no other plans for outside employment.

4. List sources and amount of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more. (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.

A copy of my financial disclosure report, dated November 22, 1993, is appended as Attachment 2.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

Appended as Attachment 3.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, date of the campaign, your title and responsibilities.

I have never held a position or played a role in a political campaign.

ATTACHMENT 2

AD-10
Rev. 1/93

FINANCIAL DISCLOSURE REPORT

Report Required by the Ethics
Reform Act of 1989, Pub. L. No.
101-194, November 30, 1989
(5 U.S.C.A. App. 6, §§101-112)

1. Person Reporting (Last name, first, middle initial) PONSOR, Michael A.	2. Court or Organization U.S. District Court Springfield, MA	3. Date of Report 11-22-93
4. Title (Article III Judges indicate active or senior status; Magistrate Judges indicate full- or part-time) U.S. Magistrate Judge (full-time)	5. Report Type (check appropriate type) <input checked="" type="checkbox"/> X Nomination, Date 11-19-93 <input type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final	6. Reporting Period through 11-22-93
7. Chambers or Office Address 1550 Main Street, Room 512 Springfield, MA 01103	8. On the basis of the information contained in this Report, it is, in my opinion, in compliance with applicable laws and regulations _____ Reviewing Officer Signature _____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on last page.

I. POSITIONS. (Reporting individual only; see pp. 7-8 of Instructions.)

POSITION

NAME OF ORGANIZATION/ENTITY

☐

NONE (No reportable positions)

Professor of Law (adjunct)

Western New England College Law School.

(1/93-5/93)

Springfield, MA

II. AGREEMENTS. (Reporting individual only; see p. 8-9 of Instructions.)

DATE

PARTIES AND TERMS

☒

NONE (No reportable agreements)

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 9-12 of Instructions.)

DATE

SOURCE AND TYPE

GROSS INCOME

(Honoraria only)

(Yours, not spouse's)

☐

NONE (No reportable non-investment income)

Salary as Professor of Law (adjunct) at

\$ 3,000.00

Western New England College Law School

\$

\$

\$

\$

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

Michael A. Ponsor

Date of Report

11-22-93

IV. REIMBURSEMENTS and GIFTS – transportation, lodging, food, entertainment.
 (Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp.13-15 of Instructions.)

SOURCEDESCRIPTION☒ X

NONE (No such reportable reimbursements or gifts)

1		
2		
3		
4		
5		
6		
7		
8		

V. OTHER GIFTS. (Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp.15-16 of Instructions.)

SOURCEDESCRIPTIONVALUE☒ X

NONE (No such reportable gifts)

1		\$
2		\$
3		\$
4		\$

VI. LIABILITIES. (Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp.16-18 of Instructions.)

CREDITORDESCRIPTIONVALUE CODE*☐

NONE (No reportable liabilities)

1	Fleet Bank	Mortgage on 25 Prospect Avenue,	L
2		Greenfield, MA	
3			
4			
5			
6			
7			

* VALUE CODES: J = \$15,000 or less K = \$15,001 to \$50,000 L = \$50,001 to \$100,000 M = \$100,001 to \$250,000
 N = \$250,001 to \$500,000 O = \$500,001 to \$1,000,000 P = More than \$1,000,000

MICHAEL A. TONOUR

Attachment 3

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate member of your household.

ASSETS			LIABILITIES		
Cash on hand and in banks	\$11,000		Notes payable to banks—secured	—	
U.S. Government securities—add schedule	—		Notes payable to banks—unsecured	—	
Used securities—add schedule	—		Notes payable to relatives	—	
Unlisted securities—add schedule	—		Notes payable to others	—	
Accounts and notes receivable:	—		Accounts and bills due	—	
Due from relatives and friends	—		Unpaid income tax	—	
Due from others	—		Other unpaid tax and interest	—	
Doubtful	—		Real estate mortgages payable—add schedule	249,000	
Real estate owned—add schedule	320,000		Chattel mortgages and other liens payable	—	
Real estate mortgages receivable	—		Other debts—(itemize:		
Autos and other personal property	40,000		CONSUMER	7,000	
Cash value—life insurance	—		THRIFT FUND LOAN	6,000	
Other assets—itemize:	—		AUTO LOAN	14,000	
U.S. THRIFT FUND	19,000				
Total assets	\$390,000		Total liabilities	269,000	
			Net worth	121,000	
			Total liabilities and net worth	390,000	
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, cosigner or guarantor			Are any assets pledged? (Add schedule.)		
On leases or contracts			Are you defendant in any suits or legal actions?		
Legal claims			Have you ever taken bankruptcy?		
Provision for Federal Income Tax					
Other special debt					

*SCHEDULE FOR REAL ESTATE:

387 Bay Rd., Amherst, residence: \$290,000

25 Prospect St., Greenfield, 1/2 owner: \$30,000 (total value: \$120,000)

*SCHEDULE FOR MORTGAGES:

387 Bay Rd., \$222,000

25 Prospect St., \$20,000 (total \$80,000)

Michael A. Ponsor

11-22-93

A. Description of Assets (including trust assets)		B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Indicate, where applicable, owner of the asset by using the parenthetical "(1)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(OC)" for co-ownership by dependent child. Place "(X)" after each asset exempt from prior disclosure.		(1) Asset Code* (A-E)	(2) Type (C-S- div., rent or int.)	(1) Value, Code* (C-P)	(2) Value Method, Code* (S-W)	(1) Type (a-b, buy, sell, margin, recomp- tion)	If not exempt from disclosure			
		(2) Date: Month- Day	(3) Value, Code* (C-P)	(4) Gain, Code* (A-E)	(5) Identity of buyer/seller (if private transaction)					
NONE (No reportable income, assets, or transactions)										
1	One-half interest in	C	Rent	R						
2	two-family house and									
3	lot at 25 Prospect									
4	Avenue, Greenfield,									
5	MA (J)									
6	2. Savings Account	A	Int	J						
7	Fleet Bank,									
8	Monarch Place Office									
9	Springfield, MA									
10	Acct. No. 011000138:									
11	07067 69922									
12										
13										
14										
15										
16										
17										
18										
19										
20										
Income/Gain Codes: A=\$1,000 or less B=\$1,001 to \$2,500 C=\$2,501 to \$5,000 D=\$5,001 to \$10,000 E=\$10,001 to \$25,000 F=\$25,001 to \$50,000 G=\$50,001 to \$100,000 H=\$100,001 to \$250,000 I=\$250,001 to \$500,000 J=\$500,001 to \$1,000,000 K=\$1,000,001 to \$2,500,000 L=\$2,500,001 to \$5,000,000 M=\$5,000,001 to \$10,000,000 N=\$10,000,001 to \$25,000,000 O=\$25,000,001 to \$50,000,000 P=\$50,000,001 to \$100,000,000 Q=\$100,000,001 to \$250,000,000 R=\$250,000,001 to \$500,000,000 S=\$500,000,001 to \$1,000,000,000 T=\$1,000,000,001 to \$2,500,000,000 U=\$2,500,000,001 to \$5,000,000,000 V=\$5,000,000,001 to \$10,000,000,000 W=\$10,000,000,001 to \$25,000,000,000 X=\$25,000,000,001 to \$50,000,000,000 Y=\$50,000,000,001 to \$100,000,000,000 Z=\$100,000,000,001 to \$250,000,000,000 AA=\$250,000,000,001 to \$500,000,000,000 AB=\$500,000,000,001 to \$1,000,000,000,000 AC=\$1,000,000,000,001 to \$2,500,000,000,000 AD=\$2,500,000,000,001 to \$5,000,000,000,000 AE=\$5,000,000,000,001 to \$10,000,000,000,000 AF=\$10,000,000,000,001 to \$25,000,000,000,000 AG=\$25,000,000,000,001 to \$50,000,000,000,000 AH=\$50,000,000,000,001 to \$100,000,000,000,000 AI=\$100,000,000,000,001 to \$250,000,000,000,000 AJ=\$250,000,000,000,001 to \$500,000,000,000,000 AK=\$500,000,000,000,001 to \$1,000,000,000,000,000 AL=\$1,000,000,000,000,001 to \$2,500,000,000,000,000 AM=\$2,500,000,000,000,001 to \$5,000,000,000,000,000 AN=\$5,000,000,000,000,001 to \$10,000,000,000,000,000 AO=\$10,000,000,000,000,001 to \$25,000,000,000,000,000 AP=\$25,000,000,000,000,001 to \$50,000,000,000,000,000 AQ=\$50,000,000,000,000,001 to \$100,000,000,000,000,000 AR=\$100,000,000,000,000,001 to \$250,000,000,000,000,000 AS=\$250,000,000,000,000,001 to \$500,000,000,000,000,000 AT=\$500,000,000,000,000,001 to \$1,000,000,000,000,000,000 AU=\$1,000,000,000,000,000,001 to \$2,500,000,000,000,000,000 AV=\$2,500,000,000,000,000,001 to \$5,000,000,000,000,000,000 AW=\$5,000,000,000,000,000,001 to \$10,000,000,000,000,000,000 AX=\$10,000,000,000,000,000,001 to \$25,000,000,000,000,000,000 AY=\$25,000,000,000,000,000,001 to \$50,000,000,000,000,000,000 AZ=\$50,000,000,000,000,000,001 to \$100,000,000,000,000,000,000 BA=\$100,000,000,000,000,000,001 to \$250,000,000,000,000,000,000 BB=\$250,000,000,000,000,000,001 to \$500,000,000,000,000,000,000 BC=\$500,000,000,000,000,000,001 to \$1,000,000,000,000,000,000,000 BD=\$1,000,000,000,000,000,000,001 to \$2,500,000,000,000,000,000,000 BE=\$2,500,000,000,000,000,000,001 to \$5,000,000,000,000,000,000,000 BF=\$5,000,000,000,000,000,000,001 to \$10,000,000,000,000,000,000,000 BG=\$10,000,000,000,000,0										

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

Volunteer work has been a continuous thread in my life, starting well before my law degree. It seems awkward to characterize this work as "serving the disadvantaged," since I have myself received so much from doing it.

As an undergraduate I volunteered during my freshman and sophomore years as a tutor for inner-city high school students. After my junior year, I spent thirteen months at the Kenya Institute of Administration at Kabete, Kenya, outside Nairobi, teaching English (the language of government) to Kenyan administrators-in-training, as part of a program sponsored by Harvard's Phillips Brooks House. After hours, my time was spent teaching remedial English to adults, and English enrichment to school children, at a small village near the Institute.

At Oxford a Labour Club gave me the chance to tutor low-income Indian immigrant children in English several hours a week in the neighborhoods outside the center of town.

During my first year in law school I joined Yale's Legal Services Organization, a forensic program offering legal services to various under-served populations. My own work was

in providing legal services for institutionalized mentally ill at Connecticut Valley Hospital in Middletown, Connecticut. This project occupied the summer after my first year. I was responsible for coordinating the work of six law students on the project during my second year, when I became a member of the board of the Legal Services Organization.

During my third year the public defenders' office in New Haven gave me the opportunity to assist in the representation of indigent and largely minority persons charged with crimes, including the conduct of non-jury trials by leave of court.

My practice with Attorney Homans during 1976-78 involved a considerable amount of pro bono work, or representation of persons of very limited means. I represented criminal defendants on appointment and indigent clients in domestic cases through the Massachusetts Bar Association.

Following my arrival in Amherst, I was able to return to my interest in the legal rights of the mentally ill through my work as the Brewster consent decree Monitor. Moreover, I continued to represent indigent criminal defendants by appointment and to represent indigent or low income persons in domestic and other civil cases on a reduced or no-fee basis.

Since 1987 I have been involved with the Amherst chapter of American Field Service, three years as its president. AFS sponsors American youngsters for summer, semester or year-long programs in foreign high schools, and brings high school students from abroad to spend a year in the United States.

While I was president our chapter was able to raise sufficient funds to provide scholarships for low income applicants who had previously found the cost of the program prohibitive.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

I have never belonged to any such organization.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you have participated).

There was a selection commission in Massachusetts, and it did recommend me as a potential nominee. Following my interview with the commission and its recommendation, I was interviewed by Senator Edward Kennedy, who forwarded my name to the President. Thereafter, I was interviewed by a representative of the Justice Department, by a special agent of the F.B.I., and by a designee of the American Bar Association.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society.
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

It is improper for a judge to disregard well established boundaries on judicial power, embodied in doctrines such as standing and ripeness. If we insist that others respect the rules, we must follow them ourselves.

It is equally true that a judge's focus must always be on the case at hand. The courts are not making stone soup, with the litigant in the role of the worthless stone, and the real ingredients -- the meat of the matter

-- the personal social concerns of the judge.

Moreover, a judge must always bear in mind our system of constitutional government, which emphasizes the coequal roles of the executive and legislative branches, and the prerogatives of the states as well, and maintain a scrupulous respect for them.

The standard instruction given to federal juries at the conclusion of a jury trial states:

Both the parties and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the court and render a just verdict, regardless of the consequences.

Although this mandate could be parsed endlessly -- the social consequence of a ruling, for example, is often a legitimate consideration -- it states concisely the role of the court as well as the jury, both in finding facts and in fashioning appropriate remedies when necessary. The task is to consider the evidence impartially, follow the law and do justice in the particular case, neither manipulating the substance of the pleadings, nor fleeing their implications.

In the beginning of the book of Deuteronomy, Moses, the Lawgiver, describes the attributes of a good judge:

Hear, the causes of your brethren and judge righteously between every man and his brother and the stranger that is with him. Ye shall not respect persons in judgment. But ye shall hear the small as well as the great alike. Ye shall not be afraid of the face of any man.

This advice -- to address the cause, to be unbiased,

and to act without fear -- timelessly expresses the challenge facing the courts. If a judge concentrates on the facts of the case, and addresses the issues raised without prejudice or timidity, he or she will transcend topical debates and gain the respect even of those who may disagree with a particular decision.

Michael A. Ponsor

ATTACHMENT 1 - Speeches and Presentations

Panel Member: "Federal Court Judicial Forum '93." Boston, MA. September 22, 1993. Sponsored by MCLE.

Presenter: "The Role of Rule 11 Sanctions." Spring seminar sponsored by Massachusetts Defense Lawyers Association. Boston, MA. May 14, 1993.

Presenter: "Settlement Conference Techniques and Alternative Dispute Resolutions in Federal Courts." National Workshop for District Judges I, New Orleans, LA. March 22 - 24, 1993.

Faculty: "How to Try a Discrimination Case to a Jury." Suffolk University Law School, Boston, MA. February 26, 1993.

Presenter: "Seminar on New Local Rules." Springfield, MA. Sponsored by Hampden County Bar Association. February 25, 1993.

Presenter: "Seminar on New Local Rules." Worcester, MA. Sponsored by the Boston Chapter of Federal Bar Association. October 27, 1992.

Presenter: "Seminar on New Local Rules." Chicopee, MA. October 14, 1992. Sponsored by MCLE.

Presenter: "Discovery: Techniques for Expedited Resolution of Discovery Disputes." Workshop for U.S. Magistrate Judges of the 4th, 5th, 11th and DC Circuits, St. Petersburg, Florida. September 14 - 16, 1992.

Presenter: "Discovery: Techniques for Expedited Resolution of Discovery Disputes." Workshop for U. S. Magistrate Judges of the 1st, 2nd, 3rd, 6th and 7th Circuits, Philadelphia, PA. July 15 - 17, 1992.

Presenter: "Process Design and Format Issues in Settlement of Civil Cases." Advanced Workshop on Settlement for U. S. Magistrate Judges, Boston, MA. June 14 - 17, 1992.

Presenter: "Discovery: Techniques for Expedited Resolution of Discovery Disputes." Workshop for Magistrate Judges of the 8th, 9th and 10th Circuits, Santa Fe, New Mexico. April 28, 1992.

Presenter: "Summary Judgment: An Overview of Summary Judgment." Workshop for Magistrate Judges of the 8th, 9th and 10th Circuits, Santa Fe, New Mexico. April 28, 1992.

Presenter: "Federal Court - Law and Practice," Springfield, Massachusetts. January 16, 1992. Sponsored by Hampden County Bar Association.

Presenter: "The Americans With Disabilities Act -- A Judicial Perspective," Mercy Hospital, Springfield, Massachusetts. November 13, 1991. Sponsored by Greater Springfield Chamber of Commerce, Workwise at Mercy Hospital, Employer's Association of Western Mass.

Presenter: "Critical Motions in the Federal Courts," Federal Court Judicial Forum '91, Boston, Massachusetts. October 24, 1991. Sponsored by MCLE.

Presenter: "Attorney/Client Privilege and Work Product Doctrine," Workshop for U.S. Magistrate Judges, 1st, 2nd, 3rd, 6th and 7th Judicial Circuits, Warren, Vermont. August 7-9, 1991.

Faculty: Attorney General's Advocacy Institute, July 17-19, 1991 U.S. Department of Justice, Office of Legal Education, Washington, D.C.

Presenter: "Attorney/Client Privilege and Work Product Doctrine," Workshop for U.S. Magistrate Judges, 4th, 5th, 11th and D.C. Judicial Circuits, Washington, D.C. July 9, 1991.

Presenter: "Case Management and Discovery Issues in Environmental Litigation," Boston, Massachusetts. June 12, 1991. Sponsored by Boston Bar Association.

Presenter: "Trial Practice & Procedure: Employment & Labor Law," Springfield, Massachusetts. October 26, 1990. Sponsored by Massachusetts Academy of Trial Lawyers.

Presenter: "Federal Court Practice," October 3, 1990, Northampton, Massachusetts. Sponsored by Hampshire County Bar Association.

Faculty: Trial Advocacy Workshop, September 21, 1990, Harvard Law School, Cambridge, Massachusetts.

Presenter: "Civil Pre-trial Practice in U. S. District Court," February 22, 1990, Springfield, Massachusetts. Sponsored by Hampden County Bar Association, Young Lawyer's Section.

Faculty: Trial Advocacy Workshop, January 22-26, 1990. Harvard Law School, Cambridge, Massachusetts.

Faculty: Attorney General's Advocacy Institute, October 25-27, 1989, U.S. Department of Justice, Office of Legal Education, Washington, D.C.

Presenter: "Abusive Discovery," July 12, 1989, Seminar for U. S. Magistrates of the 1st, 2nd, 3rd, 4th & D.C. Circuits, Boston, Massachusetts.

Presenter: "Federal District Court Practice, Social Security Disability," May 22, 1989, Holy Cross College, Worcester, Massachusetts. Sponsored by Disability Law Center.

Presenter: "Damages in Employment Cases," May 12, 1989, Fourth Annual New England Employee Relations Conference, Boston, Massachusetts. Sponsored by Massachusetts Bar Association and Massachusetts Continuing Education.

Presenter: "Federal Practice and Procedure, A View from a Session of the U. S. District Court," November 2, 1988, Springfield, Massachusetts. Sponsored by Massachusetts Continuing Legal Education.

Presenter: "Rule 11 and Discovery Sanctions," March 16, 1988, Boston, Massachusetts. Sponsored by the Federal Bar Association, Boston Chapter.

Presenter: "Representing Criminal Defendants in Federal Criminal Court: Comparison with State Court Proceedings," March 24, 1988, Boston, Massachusetts. Sponsored by Massachusetts Bar Association, Criminal Justice Section.

Presenter: "Use of Sanctions in State and Federal Courts," May 30, 1987, Sturbridge, Massachusetts. Sponsored by Massachusetts Bar Association.

Presenter: "Recent Developments in Massachusetts Federal Court Practice," February 2, 1987, Chicopee, Massachusetts. Sponsored by Massachusetts Bar Association.

Presenter: "Civil and Criminal Forfeiture," October 15, 1986, Dixville Notch, New Hampshire, Magistrates' Session, First Circuit Judicial Conference.

Presenter: "Insider's Guide to Federal District Court," April 16, 1986, Chicopee, Massachusetts. Sponsored by Massachusetts Bar Association, Young Lawyers Division.

Presenter: "How to Put a Personal Injury Case Together," April 20, 1985, Springfield, Massachusetts. Sponsored by Massachusetts Continuing Legal Education.

Senate Judiciary Committee Questionnaire

Judge Lesley Brooks Wells

I. Biographical Information (Public)

1. **Full Name (include any former names used):**

Lesley Brooks Wells
 Born: Lesley Simpson Wells
 Married: Lesley Simpson Brooks

2. **Address: List current place of residence and office address(es):**

Residence:
 16926 East Park Drive
 Cleveland, Ohio 44119

Office:
 Court of Common Pleas
 Cuyahoga County
 Justice Center, 16-B
 1200 Ontario Street
 Cleveland, Ohio 44113

3. **Date and place of birth:**

October 6, 1937
 Muskegon, Michigan

4. **Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es):**

Divorced

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

J.D., cum laude, 1974	Cleveland State University, Cleveland-Marshall College of Law Cleveland, Ohio	1969 – 1970 1972 – 1974
B.A. Philosophy, English, 1959	Chatham College, Pittsburgh, Pennsylvania	1955–1959

5. Education, continued:

Certificates	National Judicial College, University of Nevada Reno, Nevada	1983 - Present
Graduate Study Toward Masters Degree College of Urban Affairs	Cleveland State University, Cleveland, Ohio	1979 - 1983
Fellow	Institute for Humanities and Medicine, National Endowment for Humanities	1991 - 1992

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

1989 - Present	Chatham College, Pittsburgh, Pennsylvania	Trustee
1989 - 1990	Urban League of Cleveland	Trustee
1988 - 1992	Miami University, Oxford, Ohio	Trustee Officer
1986 - 1992	Rose Mary Center for Disabled Children	Trustee
1983 - Present	Common Pleas Court, Cuyahoga County, Ohio	Judge
1980 - 1983	Schneider, Smeltz, Huston & Ranney (now Schneider, Smeltz, Ranney & LaFond) Cleveland, Ohio	Associate Attorney
1980 - 1983	Cleveland State University College of Urban Studies	Adjunct Asst. Professor
1980 - 1981	Cleveland State University Cleveland-Marshall College of Law	Adjunct Instructor
1979 - 1980	ABAR III Litigation Center Cleveland State University	Attorney/ Director
1975 - 1979	Brooks & Moffet, Attorneys at Law	Partner
1975	Lesley Brooks, Attorney at Law	Attorney
1970 - 1973	Design Corner	Clerk

6. **Employment Record, continued:**

1970's	WomenSpace	Trustee
1970's	Heights Community Congress	Trustee
1970's	Heights YMCA	Trustee
1970's	Cuyahoga Women's Political Caucus	Trustee
1960 – 1961	Brown Jug Restaurant	Waitress

7. **Military Service:** Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

None

8. **Honors and Awards:** List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

- Alumni Award for Civic Achievement, Cleveland State University 1992
- Fellow, Institute for Humanities and Medicine, National Endowment for Humanities 1991 – 1992
- Distinguished Alumna Award, Chatham College 1988
- Compassionate Judicial Insight Award, The Women's City Club 1985
- Josephine Irwin Award for Outstanding Service, WomenSpace 1984
- Merit Service Award, Bar Association of Greater Cleveland 1982
- Superior Judicial Award, Supreme Court of Ohio
- Who's Who in America and American Law
- Martindale-Hubbell: AV
- Book Award, Constitutional Law, Cleveland Marshall College of Law
- Alumnae Scholar, Chatham College

9. **Bar Associations:** List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

- The American Inns of Court, No. 91
Harold H. Burton Chapter
Counselor 1993 – Present
Master of the Bench 1990 – Present
Membership Committee 1993 – 1993
- Ohio Women's Bar Association 1992 – Present
Founding Member
Chair, Bar Liaison Committee 1992 – Present
- Representative of the Supreme Court of Ohio: 1991– 1993
Steering Committee of the Ohio Supreme Court/Ohio State
Bar Association, Joint Task Force on Gender Fairness
Chairperson, Gender Bias Education 1991 – 1993
National Judicial College, Biomedical Ethics and the Law (1990)
- Cleveland State University Law and Public Policy Program 1991 – 1993
External Advisory Board
- Common Pleas Court Committees 1989 – Present
Civil Rules, Legislative, Social, Jail Facilities,
Civil Court, Criminal Court
- College of Urban Affairs, Cleveland State University 1988 – Present
Visiting Committee
- Cleveland-Marshall College of Law, Cleveland State University 1987 – 1993
Visiting Committee
- Judicial Conference of the Eighth Judicial District, Life Member 1986 – Present
- American Bar Association 1986 – Present
National Conference of State Trial Judges
Ethics and Professional Responsibility Committee (1986)
AIDS Committee (1990)
- National Association of Women Judges 1984 – Present
- Ohio State Bar Association 1983 – Present
Eighth District, Nominating Committee (1989)
Board of Governors, Section on Women in the Profession (1993)
- Ohio Judicial Conference 1983 – Present
Vice Chair, Civil Law and Procedure Committee (1993)
- Ohio Common Pleas Judges Association 1983 – Present
- National Bar Association 1980

9. **Bar Associations, continued:**

- The Association of Trial Lawyers of America 1978 – 1983
- Cleveland Bar Association 1975 – Present
Commission on Women and Law;
Vice Chair, Reorganization Committee;
Committee on Mentally Disabled; Bar Advocacy Project;
C.A.S.E. Program (Pro bono indigent representation)
- Cuyahoga County Bar Association 1974 – Present
Long Range Planning Committee
Municipal Courts Committee
- National Association of Women Lawyers 1974 – 1983
- Cleveland Women Lawyers Association 1974 – 1983
- Cleveland-Marshall Law Alumni Association 1974 – Present
Life Member
- Legal Aid Society of Cleveland 1967 – 1983
President (1979 – 1981)
Treasurer; Executive Committee; Trustee; Audit Committee;
Chair, Nominating Committee; Personnel Committee

10. **Other Memberships:** List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

None of the organizations to which I belong really are active in lobbying except as the college and university may be affiliated with educational groups which may lobby.

- Chatham College, Pittsburgh, PA 1989 – Present
Board of Trustees
- Case Western Reserve University School of Medicine, 1986 – Present
Center For Biomedical Ethics, Advisory Board
- Trinity Cathedral, Episcopal Diocese of Ohio
- The City Club, Cleveland 1993
- The Club, Society Center, Cleveland 1982 – Present

11. **Court Admission:** List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

The Supreme Court of the United States	1989
State of Ohio	1975
U.S. District Court, Northern District of Ohio	1975

12. **Published Writings:** List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

- “ ‘Wise Restraints Make People Free: The Bicentennial of the Bill of Rights’,” *Cleveland Bar Journal*, Jan. 1991, Vol. 62, No. 3, pg. 73 –74. *Exhibit for Question 12, Judiciary Committee.*
- Editor and an author, *ABAR III Civil Rights Litigation Manual*. Federal and state civil rights remedies, federal procedure, discovery, class actions, intervention, interlocutory appeals, burden of proof, attorney fees, etc., 1980; 2nd Edition, 1981, 500 pgs. *Exhibit for Question 12, Judiciary Committee.*
- Editor, *Family Violence, Summary Report to the Governor, Task Force on Family Violence*, December 1986. *Exhibit for Question 12, Judiciary Committee.*

13. **Health:** What is the present state of your health?

Excellent

List the date of your last physical examination.

May 26, 1993

14. **Judicial Office:** State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

<u>Office</u>	<u>Elected or Appointed</u>	<u>Term</u>	<u>Jurisdiction</u>
Judge Court of Common Pleas General Division	Elected 1988	1/89 – 1/95	Constitutional court of general original jurisdiction. Civil, at law and in equity where sum or matter in dispute exceeds \$10,000; appellate jurisdiction from certain state and local boards; criminal felony jurisdiction.
Judge	Appointed 1983	3/83 – 1/85	Divorce, legal separation, annulment and child custody.
	Elected 1984	1/85 – 1/87	
	Elected 1986	1/87 – 1/94	
Court of Common Pleas D.R. Division			

15. **Citations:** If you are or have been a judge, provide:

- (1) Citations for the ten (10) most significant opinions you have written:

See *Exhibit for Question 15 (1), Judiciary Committee.*

Ohio v. Walker, Case No. 268354, November 21, 1991.

Powe v. Powe (1987) 38 Ohio Misc 2d 5.

Vrndavan v. Malcolm, et al, Case No. 193258, December 2, 1992.

Eaton, et al v. Aetna, et al, Case No. 189068, September 23, 1991.

Ohio v. Dellanno, Case No. 240217, March 7, 1990.

Thomas et al v. LTV Steel Co., Inc. et al, CV 167508, April 30th, 1992.

Duale, Adm., et al v. RTA, Case No. 134037/171715, January 3rd, 1992.

Cookston v. Conroy, Case No. 178792, August 15, 1990.

Spencer, et al v. McGill, et al, and Diversified Equities, et al, Case No. 195882, May 4, 1992; Court of Appeals Case No. 64215, Affirmed per curiam, April 8, 1993.

Essef Corporation v. Mordecki Drori, Case No. 245551, October 6, 1993.

- (2) **A short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings:**

Reversed: Seven (7) cases out of 147 appealed in eleven (11) years.

Exhibit for Question 15 (2)(a), Judiciary Committee

Ohio v. Walker, CA #62862 (CR-268354), October 28, 1993.

This was a death penalty aggravated murder and mass murder case with seven (7) defendants, each entitled to separate trial and capital jury venire. Each man was charged also with aggravated burglary, aggravated robbery, attempted murder and two (2) counts of kidnapping. Only Walker retained counsel. The court appointed two lawyers for each of the other six defendants. The Court of Appeals reversed Walker's case for ineffective assistance of counsel "in failing to properly move for suppression of the evidence obtained from defendant's apartment." para. III, pg. 21. Reversed and remanded.

State Automobile Mutual Insurance Co. v. Rainsberg

CA # 61875 (CP # 191732), February 4, 1993.

In an uninsured motorist declaratory judgment case, State Auto Insurance appealed the trial court's summary judgment to an employee injured while operating a company van insured by State Auto. The Court of Appeals decided the employee was not entitled to recover damages. Reversed and remanded.

Hedges v. Gallagher, Sharp, Fulton and Norman et al.

CA # 63129 (CP # 186,401), October 15, 1992.

A woman sued in negligence for a hand injury from a conference room door at a law firm where she was deposed. The trial court granted summary judgment for the firm but the Court of Appeals found a jury issue in the employee's duties involuntarily opening the door for the woman. Reversed and remanded.

Hosaflook v. Bar-linn, Inc.,

CA# 60382 (CP # 157366), June 4, 1992.

The trial court granted a directed verdict for the Bar in a negligence case for plaintiff's failure to present medical proof on the issue of proximate cause. Hosaflook, a bar patron, allegedly fell off a bar stool. No witness saw him fall. Bar employees refused to serve him more alcohol but could find no one to drive him home. They locked him in his car to "sleep it off," taking the keys inside for his safety. An hour later he was found lying in the parking lot. There were no witnesses as to how he got out of his car or how he got a laceration over his eye. Two appellate judges found sufficient evidence to connect his skull fracture to a thump heard in the bar. One judge dissented due to the intervening fall in the lot. Reversed and remanded.

Zalewski v. Zalewski

CA# 51470 (CP 85 D-159154), January 22, 1987.

A Polish woman, 57 and disabled, came to the U.S. to defend her 29 year old marriage when she was sued for divorce by her husband who had come to the U.S. in 1970, leaving her behind to raise their two sons. The trial was conducted with Polish translation. Mrs. Zalewski repeatedly tried to leave Poland to join her husband but was unsuccessful because he had remained in the U.S. illegally. The husband sued for divorce on the grounds the parties lived one year apart without cohabitation. The trial court concluded the parties' separation was not voluntary, given the actions of the Polish government. The Court of Appeals disagreed and ordered the divorce granted. Reversed. Husband granted divorce.

(2) Citations, continued:**Turoczy v. Turoczy,**

CA# 50729 (CP D-126135), June 12, 1986.

After a divorce incorporating a settlement, wife charged, and the court on hearing found, that husband "had knowingly and intentionally transferred money and marital assets" and that his concealment of assets was a fraud on the court. The Court of Appeals held that only fraud by an officer of the court could constitute fraud on the court and reversed reinstating the original settlement.

Gramsz v. Gramsz,

CA# 49276/49280 (CP D-139721), June 27, 1985.

This case was heard by two trial referees. Several rounds of objections were filed to the referees' reports. Several time extensions were granted. The trial court denied one of the wife's motions for additional time to file objections. The Court of Appeals found such denial was error, reversed and remanded.

Affirmed in part; reversed in part: Five (5) cases of 147 appealed.

Exhibit for Question 15 (2)(b), Judiciary Committee

Ohio v. Klanac

CA # 63647 (CP # 271062), September 7, 1993.

A jury convicted Klanac of aggravated murder and kidnapping. Klanac refused to participate in his trial and was tried *in absentia*. The Court of Appeals found there was no intent to hold the murder victim as a "shield or hostage" and reversed the kidnapping but not the aggravated murder conviction.

Ohio v. Knowles,

CA # 61881 (CP # 259154), March 4, 1993.

The jury convicted Knowles of aggravated murder, murder, aggravated robbery and having a weapon as a felon. The Court of Appeals ordered the murder and firearm sentences merged.

Filmore et al v. Convention et al,

CA # 61269 (CP # 152102), October 29, 1992.

One hundred or so convention visitors claimed they became ill at a banquet and they sued. The trial court granted all defendants summary judgment as plaintiffs failed to provide evidence connecting defendants to the alleged illness. The Court of Appeals upheld the trial court as to all but one defendant regarding whom the case was reversed and remanded.

Ohio v. Hollins,

CA # 60148 (CP # 250867), April 23, 1992.

Hollins was found guilty of aggravated burglary, felonious assault and kidnapping plus a prior conviction enhancement was established. The Court of Appeals vacated the felonious assault conviction, finding defendant should not have been convicted of both assault and kidnapping as they sprang from the same conduct. Otherwise, the court affirmed.

(2) Citations, continued:**Merkel v. Merkel,**

CA # 53561 (CP # 166520), May 12, 1988.

In a contested divorce, the court entered findings including escrowed (\$10,000) settlement funds of husband and his girlfriend as marital property and awarded them equally to the parties after allocating one-half to the girlfriend who was entitled by prior Federal Court order to share in the underlying settlement. The Court of Appeals disagreed with the finding and award; otherwise agreed. Reversed and remanded on property division.

(3) Citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions: .

I am on a court of first impression and general jurisdiction. Such courts do not often engender constitutional issues. However, they regularly apply constitutional principles which I have been obliged to do orally, in trial, on hundreds of occasions. See *Exhibit for Question 15 (3), Judiciary Committee.*

State v. Burrage, CR 268354, Appeal 63824, affirmed oral trial opinion, October 18, 1993.

State v. Hall, CR 269798, Appeal 63771, affirmed oral trial opinion, October 12, 1993.

State v. Fair, CR 279394, Appeal 64843, affirmed oral trial opinion, June 17, 1993.

Willingham v. Cleveland et al, CV 134681, June 23, 1992.

Vodan v. Strongsville, CV 190982, June 23, 1992.

State v. King, CR 246047, Appeal 59536, affirmed oral trial opinion, December 18, 1991.

State v. Richard, CR 214217, Appeal 60741, affirmed oral trial opinion, November 25, 1991.

Silverberg v. Mayfield Heights, CV 194148, August 8, 1990.

State v. Dellanno, CR 240217, March 7, 1990.

Grafton v. Emplex Systems, Inc., CV 229243, November 16, 1989.

16. **Public Office:** State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed, State (chronologically) any unsuccessful candidacies for elective public office:
- Democratic Precinct Committee Person: 1981 – 1983
Cleveland, Ward II, Precinct I, Elected.
 - Cleveland Heights, Ward 2, Precinct F, Elected. 1965 – 1972
 - Unsuccessful candidacy:
Justice, Ohio Supreme Court, 1992 Primary.
17. **Legal Career:**
- a. Describe chronologically your law practice and experience after graduation from law school including:
1. Whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;
- No
2. Whether you practiced alone, and if so, the addresses and dates;
- Yes.
- Lesley Brooks Wells, Esq. 1975
2385 Kenilworth Road
Cleveland Heights, Ohio 44106
3. The dates, names and addresses of law firms or office, companies or governmental agencies with which you have been connected, and the nature of your connection with each;
- Judge 1983 – Present
Cuyahoga County Court of Common Pleas
Justice Center and Lakeside Court House
Cleveland, Ohio 44113
- Attorney 1980 – 1983
Schneider, Smeltz, Huston & Ranney
Now: Schneider, Smeltz, Ranney and LaFond
1525 National City Bank Building
Cleveland, Ohio 44114
- Attorney/Director 1979 – 1980
ABAR III Civil Rights Litigation Support Center
Cleveland-Marshall College of Law
1801 Euclid Avenue
Cleveland, Ohio 44115
(Serving 14 states in 5 Federal Circuits)

17. Legal Career, continued:

Adjunct Assistant Professor Law and Urban Policy College of Urban Affairs Cleveland State University 1801 Euclid Avenue Cleveland, Ohio 44115	1980 – 1983 1990 – Present (pro bono)
Adjunct Instructor Cleveland-Marshall College of Law 1801 Euclid Avenue Cleveland, Ohio 44115	1980 – 1981
Attorney/Partner, Brooks & Moffet Cedar and Fairmount Cleveland, Ohio 44106	1975 – 1978
Sole Practitioner, Lesley Brooks, Esq. 2385 Kenilworth Road Cleveland Heights, Ohio 44106	1975
Federal Court Intern Women's Law Fund Cleveland, Ohio	1973 – 1974
Volunteer Legal Aid Society of Cleveland Mental Health Unit Cleveland, Ohio	1970 – 1971
Lecturer Cleveland State University College of Law and College of Urban Affairs Cleveland, Ohio 44115	1974 – Present (pro bono)

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?**2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.**

Before I became a trial judge in 1983, I maintained a general civil practice including civil rights, domestic relations, tort, business, commercial, tax, trusts, estates, consumer, real estate, education, mental health, administrative and election law. I moved from a neighborhood law office to the university, then to an established downtown law firm. Specialization included two years concentration in federal practice and civil rights law.

In the neighborhood practice, my clients were predominantly individuals and families. At Schneider, Smeltz, Huston & Ranney, small and medium businesses, health, educational and charitable organizations were also my clients.

17. Legal Career, continued:

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your visits varied, describe each such variance, giving dates.

I appeared in court occasionally as a lawyer.

2. What percentage of these appearances was in:

(a) federal courts;

34%

(b) state of courts of record;

66%

(c) other courts.

0

3. What percentage of your litigation was:

(a) civil;

100%

(b) criminal.

0

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

Of eighteen (18) cases, I tried eight (8) cases to judgment, four (4) as lead counsel, three (3) as sole counsel, and one (1) as associate counsel. The rest settled during trial.

5. What percentage of these trials was:

(a) jury;

0

(b) non-jury.

100%

18. **Litigation:** Describe the ten (10) most significant litigated matters you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Sandra Loy et al v. City of Cleveland et al.

Citations if Reported: None

Docket Number: Case No. C74-253

Date: Filed March 25, 1974

Capsule Summary: Title VII sex discrimination suit regarding threatened layoffs.

Parties Represented: Nine individual plaintiffs, female Cleveland Police officers.

Nature of My Participation: Under the supervision of the Women's Law Fund, I qualified as a Legal Intern under procedures of the U.S. District Court, N.D.OH. I argued equitable relief in court before Judge Thomas Lambros and assisted in all aspects of preparation of the case. The Cleveland Police Department had segregated all women officers into the Women's Department. Through a series of cases, women were being brought onto basic patrol. At that point in the process, these women officers were threatened with lay-off.

Final Disposition of the Case: The plaintiff won equitable relief.

(a) the date of representation:

January 1 through March 29, 1974

(b) the name of the court:

U.S. District Court, Northern District, Ohio

the name of the judge or judges before whom the case was litigated:

Hon. Thomas Lambros, Judge

18. Litigation, continued:

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties:

Lead Counsel for Plaintiffs:	Jane Picker, Esq. Cleveland Marshall College of Law Cleveland State University Cleveland, OH 44115	(216) 687-2528
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Counsel for Defendants:	Malcolm Douglas, Esq. Cleveland Law Department City Hall - Lakeside Avenue Cleveland, OH 44114	(216) 664-2680
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In Re Jason Brown

Citations if Reported: None

Docket Number: Case No. 82JUV 1125

Date: August 11, 1982; November 29, 1982

Capsule Summary: Dependency adjudication and reunification plan hearing regarding young child of a deaf mother and deaf-mute father. Their older children had been permanently removed from them, adopted out of state, whereabouts unknown, for reasons these indigent parents did not know. We conducted the hearings with two kinds of interpreters since the mother could use American sign language but the father could only lip-read.

Parties Represented: Phyllis Brown, the mother. I eventually arranged for the Legal Aid Society, Ralph Rudd, to represent Jay Brown, the father.

Nature of My Participation: My clients had challenging communication barriers and were terrified of the social service and legal systems to whom they had lost their older children. Preparing them and the court for a hearing had uncommon aspects. They could not use telephone, but TDY was arranged.

Final Disposition of the Case: The court found that the child suffered no physical or psychological abuse or neglect and "that the parents are blameless." The Welfare Department was "urged to use every method at their disposal to effectively communicate with the parents."

(a) the date of representation:

In court August 11, 1982 and November 29, 1982

(b) the name of the court:

Court of Common Pleas, Juvenile Division, Lake County, Ohio

the name of the judge or judges before whom the case was litigated:

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties:

Counsel for Jay Brown: Ralph Rudd, Esq. (814) 231-8424
(now) 500 E. Marylyn, D-49
State College, PA 16801

Guardian ad Litem: **James Farrell, Esq.** (216) 352-0441
#H-301 New Market Hall
Painesville, OH 44077

Maryel Smith v. George H. Hardy

Citations if Reported: None

Docket Number: Case No. D65142, Vol. 897, Pg. 855-8.

Date: March 14, 1983

Capsule Summary: This post-decree support and visitation litigation was bitter and complex, involving long distance visitation and college expenses for three children, both of whose parents had remarried, relocated and assumed additional obligations.

Parties Represented: The out-of-state father, George H. Hardy

Nature of My Participation: Sole counsel

Final Disposition of the Case: After two days of trial, a tailor-made full settlement was reached and ordered into effect.

(a) the date of representation:

In trial February 24 through February 25, 1983

(b) the name of the court:

Court of Common Pleas, Cuyahoga County, Domestic Relations Division

the name of the judge or judges before whom the case was litigated:

Hon. Gregory C. Fuss, Referec

18. Litigation, continued:

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties:

Counsel for Plaintiff:	Larry S. Gordon Esq.	(216) 781-5245
Maryel Smith	Berkman, Gordon, Murray & Palda	
	The Illuminating Bldg.	
	Public Square	
	Cleveland, OH 44113	

Edward T. O'Neill vs. David V. Raggone, CWRU and the Andrews Foundation

Citations if Reported: None

Docket Number: 82-041934-CV

Date: April, 1982

Capsule Summary: The plaintiff, Dean of the Library Science School at Case Western Reserve University ("CWRU"), alleged that a conspiracy between the University President, CWRU and the Andrews Foundation, had deprived him of his position.

Parties Represented: President David V. Raggone and CWRU.

Nature of My Participation: Associate counsel with Jim Huston as lead counsel.

Final Disposition of the Case: A settlement agreement was signed 12/27/82 between Plaintiff, CWRU and Present Raggone; the case was dismissed with prejudice at plaintiff's costs.

(a) the date of representation:

April through December of 1982

(b) the name of the court:

Court of Common Pleas, Cuyahoga County

the name of the judge or judges before whom the case was litigated:

Hon. Ann Dyke, Judge
(now, Court of Appeals, 8th Dist. OH)

18. **Litigation, continued:**

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties:

Lead Counsel:	James Huston, Esq.	(401) 847-2316
	(now) 2 Summer Street	
	Newport, RI 02840	
Counsel for Plaintiff:	Todd M. Raskin, Esq.	(216) 248-7906
	Mazanec, Raskin & Ryder Co. LPA	
	34305 Solon Road	
	Solon, OH 44139	
Counsel for Defendant	Charles F. Clarke Esq.	(216) 470-8551
The Andrews Foundation:	Squire Sanders & Dempsey	
	4900 Society Center	
	Cleveland, OH 44114-1304	

Stenger Realty Co. v. John D. Cannell, Robert S. Wedwaldt, Susan I. Wedwaldt and Lawrence S. Supelak

Citations if Reported: None

Docket Number: Case Nos. CV 20279 and CV 33399

Date: May 12, 1982

Capsule Summary: These consolidated cases arose out of divorce proceedings and involved real estate foreclosure and specific performance actions between hostile ex-spouses, a mortgagee bank and real estate brokers. After a jury was impaneled in the consolidated cases, these cases were resolved by an in-court settlement.

Parties Represented: Defendant - Third Party Plaintiffs, Wedwaldts

Nature of My Participation: Lengthy negotiations with parties on the issues which led to the specific performance action failed. As sole counsel for the Wedwaldts, who lived in Florida, I prepared the case for trial and served as trial counsel for them.

Final Disposition of the Case: In court settlement of all issues, cases dismissed with prejudice at plaintiff's cost.

(a) the date of representation:

November 20th, 1980, through May 12th, 1982

(b) the name of the court:

Court of Common Pleas, Cuyahoga County

18. Litigation, continued:

the name of the judge or judges before whom the case was litigated:

Hon. Burt Griffin, Judge

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties:

Counsel For Plaintiff:	Michael Molnar, Esq. 4088 W. 229th St. Fairview Park, OH 44126	(216) 252-3502
Counsel For Defendant Supelak:	Richard Brown, Esq. Roudebush, Brown & Ulrich 635 NCB Building Cleveland, OH 44114	(216) 696-5200

Harvey M. Rodman v. Annette Rodman

Citations if Reported: None

Docket Number: Case No. DR 124439 and CA 45457

Date: Hearing April 15, 1982; Judgment, May 11, 1982

Capsule Summary: This was a bitterly contested post-divorce decree proceeding involving fraud, misrepresentation, perjury, and support obligations, followed by an appeal. The Plaintiff, an internationally-known scientist, through his counsel, stonewalled and refused all normal cooperation throughout discovery. After judgment following trial, Plaintiff appealed, to no avail.

Parties Represented: Defendant Annette Rodman

Nature of My Participation: I represented a divorced woman in efforts to enforce her divorce decree and to modify some of its provisions. Eventually, after an uncommonly hostile series of pretrial and trial hearings, the Court granted her relief.

Final Disposition of the Case: Judgment for Appellee Annette Rodman.

(a) the date of representation:

April 1981 through May of 1982

18. Litigation, continued:**(b) the name of the court:**

Court of Common Pleas, Domestic Relations Division, Cuyahoga County and Court of Appeals, Eighth Appellate District

the name of the judge or judges before whom the case was litigated:

Hon. Samuel Asad, Trial Referee; Hon. Herbert R. Whiting, Judge

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties:

Counsel For Plaintiff: George Braun, Esq., deceased

Susan M. Corvo v. Cuyahoga County et al

Citations if Reported: None

Docket Number: Case No. C82-3679

Date: Filed December 22, 1982

Capsule Summary: The female Deputy Director of Cuyahoga County's equal employment opportunity office was passed over for a promotion to Director of the county equal employment opportunity office. No vacancy was posted. When a male was hired for the position she filed a Title VII sex discrimination suit seeking injunctive and declaratory relief, promotion, back pay, remedies for retaliation, fees and costs. Because of her expertise, she participated actively in statistical research prior to and in preparation for litigation.

Parties Represented: Plaintiff Susan M. Corvo

Nature of My Participation: Until I was appointed to the Common Pleas Court in March, 1983, I handled all aspects of this case. We began with efforts to resolve the case through informal procedures and negotiations; then filed suit when necessary. Discovery and pre-trial proceedings went well and negotiations continued with lean trial preparation on both sides, sparing unnecessary expense.

Final Disposition of the Case: The case was settled on September 6, 1983 by James I. Huston, Esq. who succeeded me as counsel when I was appointed Common Pleas Judge. Plaintiff received back pay, transfer to an agreed position and attorney's fees.

(a) the date of representation:

December 22, 1982 through March, 1983

(b) the name of the court:

U.S. District Court, Northern District of Ohio

18. Litigation, continued:

the name of the judge or judges before whom the case was litigated:

Hon. John Manos, Judge

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties:

Counsel For Defendant: Patrick J. Murphy, Esq. (216) 443-7791
 Asst. County Prosecutor
 Justice Center
 Cleveland, OH 44113

State ex rel Cleveland Heights Municipal Court v. Marjorie Wright, Mayor, et al

Citations if Reported: None

Docket Number: Case No. 76-1073, Supreme Court of Ohio

Date: Filed September 21, 1976

Capsule Summary: The original Action in Mandamus was filed in the Ohio Supreme Court when the City of Cleveland Heights, through action of its Council, unilaterally transferred to the Cleveland Heights Municipal Court, the Violations Bureau, without employees and without operating funds. The Bureau had been operated by the City with seven employees at a cost of half a million dollars per year. Simultaneously, the city removed the police officer assigned as Court Bailiff. These actions, taken after a new judge defeated her twenty-year predecessor, left the busiest municipal court in the State (by filings per judge) unable to meet payroll through the year.

Parties Represented: Cleveland Heights Municipal Court and Judge Sara Hunter, Plaintiff-Realtors

Nature of My Participation: I was sole counsel to the Court originally as we attempted to negotiate a resolution with the City to prevent a shutdown of the Court. I brought on as co-counsel an experienced litigator and negotiator, Bernie Direnfeld, to assist with a negotiated resolution. We made no progress and so filed an Action in Mandamus in the Ohio Supreme Court as we continued negotiating. Some progress was made. This year the Judge will retire after eighteen years of service.

Final Disposition of the Case: Dismissed.

(a) the date of representation:

Filed November 21, 1976

(b) the name of the court:

The Supreme Court of Ohio

18. Litigation, continued:

the name of the judge or judges before whom the case was litigated:

Justices of the Ohio Supreme Court

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties:

Co-Counsel:	Bernard Direnfeld, Esq., deceased	
Counsel for Defendants:	Jules N. Koach, Esq. Leader Building Cleveland, OH 44114	(216) 241-2500
For State of Ohio:	William J. Brown, Esq. Ohio Attorney General State Office Tower Cleveland, OH 44114	(216) 787-3030

Arlene M. Berke, et al v. Sportsmen's Club, Inc. et al

Citations if Reported: None

Docket Number: Case No. 76 CI F1681; Ohio Civil Rights Commission
Complaint No. 2823

Date: Case filed May 12, 1976; Complaint filed February 17, 1987

Capsule Summary: Breach of contract and sex discrimination in public accommodations suit by women who paid defendants for an advertised trip to the Bahamas for themselves and their spouses. Three days before the scheduled flight, plaintiffs were notified they could not participate because it was a "Stag Junket". Nothing in the newspaper ads had mentioned exclusion of women or of married women.

Parties Represented: Plaintiffs Arlene M. Burke, Sally Roseman, and Judith Shamis.

Nature of My Participation: I was lead Counsel and tried with case with my partner, Beverly Moffet, Esq. as co-counsel. We also represented the plaintiffs in the Ohio Civil Rights Commission proceedings where we obtained a Conciliation and Consent Order.

Final Disposition of the Case: Judgment for plaintiffs with compensatory and punitive damages plus attorney fees; Conciliation Agreement and Consent Order in Plaintiff's favor in Ohio Rights Commission action.

(a) the date of representation:

May of 1976 through March 30, 1977

18. Litigation, continued:**(b) the name of the court:**

The Shaker Heights Municipal Court, Ohio, and the Ohio Civil Rights Commission

the name of the judge or judges before whom the case was litigated:

Hon. Manuel M. Rocker, Judge

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties:

Counsel for Defendant:	Leonard P. Gilbert, Esq. 1366 Hanna Building Cleveland, OH 44115	(no telephone number currently listed)
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Co-Counsel:	Hon. Beverly Moffet, Chief Referee (216) 443-8836 One Lakeside Court House Cleveland, OH 44113
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Deane C. Joines v. Benjamin F. Bailar, Postmaster General et al

Citations if Reported: None

Docket Number: Case No. C76-136

Date: Filed February 10, 1976

Capsule Summary: A fifty-eight year old female customer service representative with eighteen years of service and outstanding evaluations sought promotion to a position level held by few women in the U.S. Postal Service: Customer Service Representative, Senior. A male who was promoted had rated lower on all announced criteria. USPS failed to process plaintiff's administrative remedies. She brought suit for injunctive and declaratory relief, promotion, back pay, relief from retaliation, fees and costs.

Parties Represented: Plaintiff Deane Joines

Nature of My Participation: As co-counsel with my partner, Beverly Moffet, Esq., I was responsible for conducting hearings, depositions and trial. We both did research and jointly prepared the case, each participating in phases of discovery and settlement negotiations. Due to the vast amount of paperwork maintained by the USPS, discovery in preparation for suit was complicated.

Final Disposition of the Case: Full settlement on September 20, 1977

(a) the date of representation:

Case filed February 10, 1976, representation through September 20, 1977

18. Litigation, continued:

(b) the name of the court:

U.S. District Court, Northern District of Ohio

the name of the judge or judges before whom the case was litigated:

Hon. Frank J. Battisti, Judge

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties:

Counsel for Defendant:	Richard Froelke, Esq. Regional Labor Counsel, USPS 433 Van Buren Street, Room 901 Chicago, IL 60699	(216) 886-3031
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Joseph A. Cipollone, Esq. Asst. U.S. Attorney 400 U.S. Court House Cleveland, OH 44114	(216) 522-4336
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19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which didn't progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

As Attorney/Director of the ABAR III Civil Rights Litigation Support Center, with staff I trained and provided federal litigation resources to lawyers in fourteen (14) states and five (5) Federal Circuits.

When time permits, I lecture and teach law and urban policy as an adjunct assistant professor, *pro bono*. In the College of Urban Studies, I bring law to graduate students in economics, sociology, psychology, business, environmental science and urban planning.

When I was in general civil practice, much of my work involved matters outside litigation such as work for Judson Park Retirement Center, small business, tax and estate planning matters. We represented plaintiffs and defendants.

Senate Judiciary Committee Questionnaire

II. Financial Data and Conflict of Interest (Public)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients and customers:

• PERS, Ohio public employee vested retirement benefits of \$64,000: eligible to receive account balance disbursements on resignation or retirement.

Please describe arrangements you have made to be compensated in the future for any financial or business interest:

None

2. Explain how you will resolve any potential conflict-of-interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflict-of-interest during your initial service in the position to which you have been nominated.

I know of no present conflict situations. In my ten plus years as a state trial judge, staff and I have scanned the docket regularly for potential conflicts. For example, for many years no one from my former firm appeared before me and we continue to disclose the prior association immediately to all parties. I have no stocks, investments or business interests. Full disclosure, divestment, and recusal could be proper if conflict situations occur. I follow the Code of Judicial conduct.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court. If so, explain:

No

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more:

AO-10
Rev. 1/93

FINANCIAL DISCLOSURE REPORT

Report Required by the Ethics
Reform Act of 1989, Pub. L. No.
101-194, November 30, 1989
(5 U.S.C.A. App. 6, §§101-112)

1. Person Reporting (Last name, first, middle initial) WELLS, LESLEY BROOKS	2. Court or Organization Nominee, U.S. District Court, Northern District of Ohio	3. Date of Report 11-23-93
4. Title (Article III Judges indicate active or senior status; Magistrate Judges indicate full- or part-time) Nominee, Judge, U.S. District Court, Northern District of Ohio	5. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date <u>11-19-93</u> <input type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final	6. Reporting Period 1-1-92 to 10-31-93
7. Chambers or Office Address Judge Lesley Brooks Wells Justice Center, 16-B 1200 Ontario Street Cleveland, Ohio 44113	8. On the basis of the information contained in this Report, it is, to my opinion, in compliance with applicable laws and regulations _____ Reviewing Officer Signature _____	

IMPORTANT NOTES: *The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on last page.*

I. POSITIONS. (Reporting individual only; see pp. 7-8 of Instructions.)

POSITIONNAME OF ORGANIZATION/ENTITY

<input type="checkbox"/> NONE (No reportable positions)	
Trustee Counselor, Harold Burton Chapter	Chatham College, Pittsburgh, PA American Inns of Court, No. 91
Trustee (until 2-92)	Rose Mary Center for Children
Trustee (until 2-29-92)	Miami University, Oxford, OH

II. AGREEMENTS. (Reporting individual only; see p. 8-9 of Instructions.)

DATEPARTIES AND TERMS

<input type="checkbox"/> NONE (No reportable agreements)	
to be determined	PERS, Public Employee Retirement System of Ohio, eligible to receive account balance disbursement

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 9-12 of Instructions.)

DATESOURCE AND TYPEGROSS INCOME
(yours, not spouse's)

<input type="checkbox"/> NONE (No reportable non-investment income)		
1 1/1/92 - 12/31/92	Ohio: Judicial salary	\$ 72,651.54
2 1/1/92 - 12/31/92	Cuyahoga County, Ohio: Judicial salary	\$ 13,407.98
3 1/1/93 - 10/29/93	Ohio: Judicial salary	\$ 60,481.66
4 1/1/93 - 10/22/93	Cuyahoga County, Ohio: Judicial salary	\$ 12,352.12
5		\$

Page 27

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

WELLS, LESLEY BROOKS

Date of Report

11-23-93

IV. REIMBURSEMENTS and GIFTS - transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp.13-15 of Instructions.)

SOURCEDESCRIPTION☐

NONE (No such reportable reimbursements or gifts)

1

N/A

2

3

4

5

6

7

8

V. OTHER GIFTS. (Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp.15-16 of Instructions.)

SOURCEDESCRIPTIONVALUE☐

NONE (No such reportable gifts)

1

N/A

2

3

4

\$

\$

\$

\$

VI. LIABILITIES. (Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp.16-18 of Instructions.)

CREDITORDESCRIPTIONVALUE CODE*☒

NONE (No reportable liabilities)

1

2

3

4

5

6

7

* VALUE CODES: J = \$15,000 or less K = \$15,001 to \$50,000 L = \$50,001 to \$100,000 M = \$100,001 to \$250,000
 N = \$250,001 to \$500,000 O = \$500,001 to \$1,000,000 P = More than \$1,000,000

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

WELLS, LESLEY BROOKS

Date of Report

11-23-93

VII. INVESTMENTS and TRUSTS -- income, value, transactions. (Includes those of spouse and dependent children; see pp. 18-27 of Instructions.)

A. Description of Assets (including trust assets) Indicate, where applicable, owner of the asset by using the parenthetical: "(S)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child. Place "(X)" after each asset exempt from prior disclosure.	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1)	(2)	(1)	(2)	If not exempt from disclosure				
	Asset Code (A-B)	Type (e.g., div., rent, int.)	Value Code (J-P)	Value Method Code (Q-W)	(1) Type (e.g., buy, sell, margin, redemption)	(2) Date: Month Day	(3) Value Code (J-P)	(4) Gain Code (A-B)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)									
1 PERS of Ohio	None		L	T	None				
2									
3									
4									
5									
6									
7									
8									
9									
10									
11									
12									
13									
14									
15									
16									
17									
18									
19									
20									

1 Income/Gain Codes: A=\$1,000 or less B=\$1,001 to \$2,500 C=\$2,501 to 5,000 D=\$5,001 to \$15,000
 (See Col. B1 & B4) E=\$15,001 to \$50,000 F=\$50,001 to \$100,000 G=\$100,001 to \$1,000,000 H=more than \$1,000,000
 2 Value Codes: J=\$15,000 or less K=\$15,001 to \$50,000 L=\$50,001 to \$100,000 M=\$100,001 to \$250,000
 (See Col. C1 & C3) N=\$250,001 to \$500,000 O=\$500,001 to \$1,000,000 P=more than \$1,000,000
 3 Value Method Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market
 (See Col. C2) U=Book Value V=Other W=Estimated

Page 29

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

Date of Report

WELLS, LESLEY BROOKS

11-23-93

VIII. ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate part of Report.)

NONE

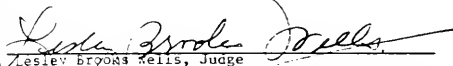
IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C.A. app. 7, § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature



Lesley Brooks Wells, Judge

Date 11-23-93

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C.A. APP. 6, § 104, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Judicial Ethics Committee
Administrative Office of the
United States Courts
Washington, DC 20544

**Judge Lesley Brooks Wells Financial Statement
Net Worth**

October 31, 1993

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	\$2,500.00	Notes payable to banks - secured	\$0.00
U.S. Govern. securities - add schedule	\$0.00	Notes payable to banks - unsecured	\$0.00
Listed securities - add schedule	\$0.00	Notes payable to relatives	\$0.00
Unlisted securities - add schedule	\$0.00	Notes payable to others	\$0.00
Accounts and notes receivable	\$0.00	Accounts and bills due	\$0.00
Due from relatives and friends		Unpaid income tax	\$0.00
Due from others		Other unpaid tax and interest	\$0.00
Doubtful (judgement)	(\$5,000.00)	Real estate mortgages payable	
Real estate owned - add schedule*	\$145,000.00	* - add schedule (Third Federal S&L)	\$103,000.00
Real estate mortgages receivable	\$0.00	Chattel mortgages and other liens payable	
Autos and other personal property	\$8,000.00	Other Debts - itemize	
Cash value - life insurance	\$0.00		
Other assets - itemize		Star VISA	\$5,000.00
Boats	\$5,000.00		
Household goods	\$35,000.00		
Jewelry	\$4,000.00	TOTAL LIABILITIES	\$108,000.00
Vested pension PERs	\$64,000.00	NET WORTH	\$160,500.00
		TOTAL LIABILITIES AND	
TOTAL ASSETS	\$268,500.00	NET WORTH	\$268,500.00
CONTINGENT LIABILITIES		GENERAL INFORMATION	
An endorser, comaker or guarantor	\$0.00	Are any assets pledged? (Add schedule)	NO
On leases or contracts	\$0.00	Are you defendant in any suits or	
Legal Claims	\$0.00	legal actions?	NO
Provision for Federal Income Tax	\$0.00	Have you ever taken bankruptcy?	NO
Other special debt	\$0.00		

*Residence: 16926 East Park Drive, Cleveland, OH 44119

6. Have you ever held a position or played a role in a political campaign?:

Yes.

If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities:

- Campaign Manager, Mary O. Boyle for State Representative, 1978
- Various campaigns in Ohio, 1974 – 1983
- Candidate: Judge, Court of Common Pleas, Cuyahoga County, elected 1984, 1986, 1988
- Justice, Ohio Supreme Court, unsuccessful candidate, 1992 Primary

Senate Judiciary Committee Questionnaire

III. General (Public)

1. **An ethical consideration under the Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.:**

At present, I serve four hours every weekend on an anonymous mental health crisis intervention hotline for the Free Medical Clinic. Occasionally I teach law and urban policy, pro bono, as an adjunct assistant professor at Cleveland State University.

I served as an officer of the Cleveland Legal Aid Society from law school graduation until I completed my service as President.

In 1981 - 82, as Vice Chair of the Reorganization Committee of the Cleveland Bar Association, I was responsible with others for conceiving and implementing a pro bono program, CASE, for participation by all Cleveland area attorneys. The Bar Association's Statement of Commitment, which I drafted, is as follows:

"Affirming our profession's commitment to equal justice for all persons and the individual responsibility of lawyers as officers of the Court, the Bar Association of Greater Cleveland asks each lawyer to examine and act upon his or her individual professional obligation to provide legal services to those unable to afford them. Join with your fellow lawyers to ensure that no one, for lack of funds, is denied right or justice."

For this work I received the Merit Service Award of the Cleveland Bar Association.

For three years, 1984-1987, I traveled throughout Ohio as Chair of the Governor's Task Force on Family Violence. The Task Force focused on child abuse, elder abuse, and domestic violence. We made fifty four (54) recommendations to the Governor, Legislature, state and local agencies. Fifty three (53) of our recommendations were implemented.

I have served the disadvantaged in numerous organizations. I served as Trustee of the Urban League of Cleveland, 1989 - 1990 and of Rose Mary Center from 1986 - 1990. Rose Mary Center is a residential treatment and education facility for children aged four to sixteen who are dual-diagnosed with multiple physical and learning disabilities. Home care is not available to these children.

As a member of Case Western Reserve University School of Medicine's Center for Biomedical Ethics Advisory Board, 1986 - present, I serve those disadvantaged by medical catastrophe or crisis. This is an outgrowth of prior volunteer work in inner city emergency rooms.

1. Serving the disadvantaged, continued:

Mental health patients caught in the misdemeanor criminal justice system pose special problems which I worked to resolve through the Federation for Community Planning and the Cleveland Bar Association. I served on the Citizen's Advisory Board of the Cleveland Psychiatric Institute. Through the Legal Aid Society, I served as a volunteer advocate inside one of our state mental hospitals, Fairhill Psychiatric Institute.

I have served as a board member of several organizations designed to address disadvantages specific to women: Women's Equity Planning Project, WomenSpace, United Way Task Force on Women. I was Chair of the Legal Caucus of the National Women's Political Caucus as well as the state and local Women's caucuses.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex or religion. Do you currently belong, or have belonged to any organization which discriminates – through either formal or membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have one to try to change these policies?:

Brownie and Girl Scouts in the 1940's.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts?:

No

Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstance which led to your nomination and interviews in which you participated):

Initially I applied by letter, Curriculum Vitae and a list of two dozen references; people who know me well from diverse times and perspectives. Senator Metzenbaum and Senator Glenn each interviewed me, separately, twice. I completed the comprehensive judicial application provided for me by Senator Metzenbaum and furnished both Senate offices with a full response. A team of four, two staff members from each Senator's office, interviewed me on a wide range of legal and professional topics.

On May 7, 1993, the Senators recommended to President Clinton that he appoint me to a vacancy on the Federal District Court, Northern District of Ohio.

The office of White House Counsel provided me forms, waivers and fingerprint charts for information relevant to White House, Justice Department, ABA, FBI and Senate review of my qualifications, background and experience. All requested information was provided by me to the White House.

3. **Judicial selection process, continued:**

I was contacted and interviewed by representatives of the Justice Department, FBI and ABA in Washington and Cleveland. Additional information was provided them as requested.

On November 19, 1993 I was advised by Bernard Nussbaum, Esq., Counsel to The President, that President Clinton had nominated me to be U.S. Judge, Northern District of Ohio and that he had sent my name to the U.S. Senate for confirmation proceedings.

4. **Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could be reasonably interpreted as asking how you would rule on such case, issue or question:**

No

5. **Please discuss your views on the following criticism involving "judicial activism:"**

The role of the Federal judiciary within the Federal government, and with society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution:
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals:
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society:
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness:
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities:

Traditionally courts confine what they say to the facts before them. A judge is out of line when she or he injects into a case a problem or issue which is unnecessary to the decision.

It is said judges should not make law. The principle is sound but in reality judges sometimes cannot avoid "making law." If a particular case raises an issue of interpretation and there is no precedent to apply to the facts under *stare decisis*, then whether the Court answers *yea* or *no* to a question "makes law." Great restraint should be exercised, but the case must be decided.

5. **“Judicial activism”, continued:**

Judges dispose of cases; they are not equipped or staffed to administer institutions. Thus a judge is singularly ill-fitted to exercise continuing oversight. Having no staff, judges must act through surrogates. Where remedies are due, judges should craft them leanly and narrowly to confine them to proper judicial limitations.

Any analysis of standing must be careful so as not to deny without good cause a person's access to the courts. Docket considerations, however compelling, should not in themselves obstruct legitimate access to the courts. As a doctrine limiting judicial review, standing determines who can litigate under the Article III cases and controversies requirement of the U.S. Constitution. The ripeness doctrine requires injury in fact or significant threat of imminent harm. Ripeness, like mootness, is involved when determining whether an issue may be litigated.

JUDGE LESLEY BROOKS WELLS

Affidavit

I, LESLEY BROOKS WELLS, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

DECEMBER 17, 1993
(DATE)

Lesley Brooks Wells
(NAME)

Daniel R. R. R.
(NOTARY)

Notary Public
My Comm. Expires 12-31-94
My Comm. No. 12345

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name: (include any former names used.)

Marjorie Osterlund Rendell (née Marjorie May Osterlund)

2. Address: List current place of residence and office address.

Home: 3425 Warden Drive
Philadelphia, PA 19129

Office: Duane, Morris & Heckscher
One Liberty Place, 42nd Floor
Philadelphia, PA 19103-7396

3. Date and place of birth:

12/20/47 - Wilmington, DE

4. Marital Status (include maiden name of wife, or husband's name): List spouse's occupation, employer's name and business address(es).

Married: Hon. Edward G. Rendell
Mayor, City of Philadelphia
Room 215 - City Hall
Philadelphia, PA 19107

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

University of Pennsylvania
Attended 1965-1969; B.A. degree received May 1969

Georgetown University Law Center
Attended 1970-1971 (no degree; transferred to Villanova upon marriage)

Villanova School of Law
Attended 1971-1973; J.D. degree received May 1973

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Employment:

1973-1978 University of Pennsylvania
 Development Department; Assistant to
 Director of Annual Giving

1972-present Duane, Morris & Heckscher
 Summer 1972 - Summer law clerk
 1972-1973 - part-time law clerk
 1973-1981 - full time associate
 1981-present - partner

Other (boards):

1973-1978

Philadelphia Bar Association
 Board of Directors, Young Lawyers
 Section

Late 1970s - Present

University of Pennsylvania
 (various advisory boards)

1978 - Present

Visiting Nurse Association
 of Greater Philadelphia
 Visiting Nurse Society

Late 1980s - Present

East Falls Advisory Board of
 Chestnut Hill National Bank
 Pennsylvania's Campaign for Choice

1992 - Present

Academy of Vocal Arts
 Avenue of the Arts, Inc.
 Market Street East Improvement Association
 Philadelphia Bar Foundation
 Philadelphia Friends of Outward Bound

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, aerial number and type of discharge received.

No.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Phi Beta Kappa at University of Pennsylvania.

Philadelphia College of Textile and Science
Doctor of Laws - Honorary Degree awarded in May 1992

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

American Bar Association
Pennsylvania Bar Association
Philadelphia Bar Association
Board of Directors, Young Lawyers Section (1973-78)
American Bankruptcy Institute
Eastern District of Pennsylvania Bankruptcy Conference
Philadelphia Bar Foundation (Board member)
Alternative Dispute Resolution Committee
of the Eastern District Bankruptcy Conference
Mediation Division

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Organizations active in lobbying: None.

Other Memberships:

Academy of Vocal Arts
Avenue of the Arts, Inc. (Vice-Chair)
Bala Golf Club
Chestnut Hill National Bank/East Falls Advisory Board
Market Street East Improvement Association
Pennsylvania's Campaign for Choice
Philadelphia Bar Foundation
Philadelphia Friends of Outward Bound
Forum of Executive Women
International Women's Forum
University of Pennsylvania
Athletic Advisory Board (Associate Trustee)
Trustees' Council of Penn Women
Women's Athletic Board
Vesper Club
Visiting Nurse Association of Greater Philadelphia
(Vice Chair of Board of Trustees)
Visiting Nurse Society (Board of Managers)

11. Court Admission: List all courts in which you have been admitted to practical with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for

administrative bodies which require special admission to practice.

U.S. Court of Appeals for the Third Circuit (4/27/78)
 U.S. District Court for the Eastern District
 of Pennsylvania (3/18/75)
 Supreme Court of Pennsylvania (11/15/73)

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Publications:

Contributing author of seminar materials published in connection with annual seminar presentations; drafted sections on Secured Creditor Claims and Adequate Protection in all editions. The most recent editions are:

Developments in Reorganization and Commercial Finance Law -- 1991 and 1992 (Tenth Annual Seminar) (378 pps.)

Duane, Morris & Heckscher
 Reorganization and Finance Section
 Copyright 1992 Duane, Morris & Heckscher

Developments in Reorganization and Commercial Finance Law -- 1990 and 1991 (Ninth Annual Seminar) (305 pps.)

Duane, Morris & Heckscher
 Reorganization and Finance Section
 Copyright 1991 Duane, Morris & Heckscher

Developments in Bankruptcy Reorganization and Finance: 1989 (A 1990 Annual) (289 pps.)

Duane, Morris & Heckscher
 Reorganization and Finance Section
 Copyright 1990 Aspen Publishers, Inc.

I am also the author of unpublished materials incorporated into approximately twenty presentations given at seminars in which I participated over the past several years on various bankruptcy, creditors rights and real estate issues. These seminars included an annual seminar, "Developments in Reorganization and Commercial Finance Law," presented every year since 1982 by the Reorganization and Finance Section of Duane, Morris & Heckscher in several cities, including Philadelphia, Wilmington, Boston, and New York, to public audiences comprised primarily of clients and commercial lenders.

13. Health: what is the present state of your health? List the date of your last physical examination.

Excellent. Most recent physical examination: April 1992.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

None.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Not applicable.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Committeewoman for the Republican Party,
30th Ward, 20th Division from 1972-1976.

17. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including;

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

Not applicable.

2. whether you practiced alone, and if so, the addresses and dates;

Not applicable.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with

which you have been connected, and the nature of your connection with each.

1972-present Duane, Morris & Heckscher
 Summer 1972 - Summer law clerk
 1972-1973 - part-time law clerk
 1973-1981 - full time associate
 1981-present - partner

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

My practice has always focused on business and commercial law, commencing with general corporate, banking and securities work from 1973 to 1975, and bankruptcy and reorganization and finance specialty from 1975 to the present. My practice has focused on the debtor-creditor relationship, in and out of bankruptcy proceedings, involving extensive negotiation and varying amounts of litigation over the years. In the late 1970s and mid-1980s, I was involved in commercial collection litigation and extensive workout negotiation in bankruptcy proceedings of debtor clients as well as creditor clients in and out of bankruptcy proceedings. The amount in controversy was usually in the range of \$2-10 million. Since the mid-1980s, my work has also included many larger, more complex matters, involving primarily negotiation of amounts due and owing to clients in the multi-million dollar range, with emphasis on negotiation of complex issues and less active litigation. Many of my more recent cases have either been resolved out of court or through out of court negotiations in an otherwise consensual bankruptcy proceeding. Much of my time has been spent in drafting of agreements and documents, including pleadings, for such workouts and bankruptcy proceedings. I have also been engaged in loan restructures and documentation of loans and other financial agreements in similar workout or problem loan situations.

2. Describe your typical former clients and mention the areas, if any, in which you have specialized.

My typical clients over the years have been banks and insurance companies, unsecured creditors and creditors' committees, as well as debtors in workouts and bankruptcy proceedings. I would estimate that 80% of my time has been spent representing secured creditors. I have specialized in issues relating to the rights of

secured creditors, including but not limited to issues of perfection, lender liability, and fraudulent conveyances. I have also tried many relief from stay motions and complaints to conclusion of behalf of secured creditors.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

In examining my practice since 1988, I find that the number of court appearances has changed radically in 1992 and 1993. My husband became Mayor of Philadelphia in January of 1992, and I have delegated many of the court appearances to others; also, during 1992, my primary focus was on two major cases, both of which involved out of court restructurings of amounts in excess of \$100 million of indebtedness; in these cases we represented, in one case, the bank group, and in the other, the subordinated debenture group. Also, during this time period, my department of the firm (the Reorganization and Finance Section) has delegated much of the commercial litigation to a special group of attorneys in our Litigation Department which routinely does this work with and for our section's attorneys. During the prior four years, namely, from 1988 through 1991, I appeared regularly in court in any given year on matters in which we represented the major secured creditor of a company in chapter 11. There were probably five to ten such cases in any given year. Also during this time period, I represented the trustee in a chapter 11 proceeding, and appeared regularly in at least two complex chapter 11 proceedings in which we represented different classes of indebtedness. I believe that during 1988 through 1991 I appeared in court anywhere from three to eight days per month.

Court appearances were more frequent during the previous time, namely, the time period from 1980 through 1988. More of the cases which I handled involved individual secured creditor rights, rather than complex cases, and matters such as the right of the secured creditor to take back the collateral pursuant to a hearing for relief from the stay were tried to conclusion frequently. I appeared in court very regularly, perhaps as many as two to three days per week.

2. What percentage of these appearances was in:

(a) federal courts;

Most appearances were in federal courts
(95-100%)

(b) state courts of record;

Seldom (0-5%); appeared only in connection
with execution on or enforcement of
judgments, or opening of judgment
proceedings.

(c) other courts.

0%

3. What percentage of your litigation was:

(a) civil;

100%

(b) criminal

0%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel or associate counsel.

My experience has been primarily in the bankruptcy courts in which a chapter 11 case is pending. Many contested matters and adversary proceedings are brought before the court by way of complaint or motion, which are heard by the court, non-jury, following the Federal Rules of Civil Procedure (made applicable by the Federal Rules of Bankruptcy Procedure) as well as the Federal Rules of Evidence, usually in hearings lasting from one to three days. It is difficult to state "cases" that have been "tried to verdict or judgment" because, in each instance, the matters involved hearings on fraudulent conveyances, relief from stay, preference actions, motions to dismiss, and the like. Many of these were tried to conclusion, but not all led to the end of the case or total resolution of a matter. I have handled my own cases and except in a few instances in which I was assisted by an associate, have been sole and chief counsel in matters I have handled. I have appeared and litigated in over 35 bankruptcy matters.

5. What percentage of these trials was:

(a) jury.

0%

(b) non-jury.

100%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;

(b) the name of the court and the name of the judge or judges before whom the case was litigated; and

(c) The individual names, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Please see Exhibit A attached hereto.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

I have been involved in many significant legal activities related to my practice area as well as the practice of law in general. I have been an active participant in seminars focusing on various areas of bankruptcy and creditors rights law, including real estate, leveraged buyouts, preferences, foreclosure strategies, and the impact of bankruptcy issues on state trial proceedings. I speak annually at the Temple Law School Forum, addressing students on such issues as the nature of the practice of bankruptcy and the role that debt plays in our society.

I am also a regular speaker at our annual bankruptcy department seminars which showcase developments in this area of the law.

I am an active member of the Eastern District of Pennsylvania Bankruptcy Conference, formed five years ago to foster education, communication and relationships among bankruptcy lawyers in the area. We now have over 450 members, and sponsor dinners semi-annually and a two-day educational retreat each year. I am a regular participant and usually a facilitator at the educational programs. My partner, David Sykes, is currently the chairman of the conference.

I have recently served on a committee to explore and implement alternative dispute resolution by means of mediation in our bankruptcy court system. I have served as a mediator in our district court mediation program and, in response to a request from our bankruptcy judges, am helping to formulate a local bankruptcy rule to implement such a program in the bankruptcy court suited to the specific needs and unique aspects of the system.

My bar-related activities include current involvement in the Philadelphia Bar Foundation, a fundraising arm of the Philadelphia Bar Association which raises money for grants to law-related projects throughout the city. I have been active in soliciting funds for these projects and considering programs worthy of support.

As a younger lawyer I was an advocate for disadvantaged children under a program sponsored by the Support Center for Child Advocates, a program which provides attorneys to represent the interests of abused children at the charging stage and to interface with social workers and relatives. I was also elected to the board of the Young Lawyers Section of the Philadelphia Bar Association and served for several years on various committees, one of which explored and proposed a revamping of sheriff's sale procedures for abandoned housing.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

Upon termination of my relationship with Duane, Morris & Heckscher, my capital, in the approximate amount of \$56,000, will be returned to me, and I will receive a termination payment of approximately my average compensation for the past two years, to be paid upon termination over up to two years, at my option. I intend to move my HR10 and 401K funds to an independent IRA.

Also, I anticipate receiving income from the rental of a vacation home that my husband and I own, which averages \$12,000-\$14,000 (gross) per year.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

I intend to disqualify myself from hearing matters involving: the City of Philadelphia; Meridian Bancorp., Inc.; the Visiting Nurse Association of Greater Philadelphia; the University of Pennsylvania; and entities in which I have a "financial interest" pursuant to 28 U.S.C. § 455. I will follow the dictates of 28 U.S.C. § 455 as to disqualification due to a conflict regarding any other matters or interest.

I will need to establish a policy relating to disclosure and waiver, or disqualification, as to persons or entities appearing before me who have been contributors to my husband's political campaigns; beyond a certain dollar amount or degree of support, I would probably disqualify myself, but do not know of many persons or entities expected to appear before me who would fall into such a category.

I will try to strike a balance between the ethical aspects of the situation and the practicalities of the administration of justice. In all instances I will follow the Canons of Judicial Ethics.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

Please see copy of Form AO-10 attached hereto.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

Attached.

6. Have you ever held a position or played a role in a political campaign? if so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I have played an active, but not official, role in various campaigns of my husband, Edward G. Rendell. He served as District Attorney for the City of Philadelphia for eight years commencing in 1978. He ran unsuccessfully in the primary for Governor of Pennsylvania in the spring of 1986, and unsuccessfully in the primary for Mayor of Philadelphia in the spring of 1987. He was successful as a candidate for Mayor of Philadelphia in the primary held in May of 1991, as well as in the fall general election in November of 1991, and is currently Mayor of Philadelphia for the term commencing January 1992 to December 31, 1995.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

My pro bono and community service activities have been in the form of my active service on the boards of various organizations. My longest community service association has been with the Visiting Nurse Association of Greater Philadelphia (VNA), having served on its board and headed many of its committees over the past fifteen years. The VNA is the only homebound home care entity which provides services to the indigent in the Philadelphia area, and I have been personally involved in fundraising and other efforts for the poor and indigent of Philadelphia in this way. The organization prides itself on its mission of providing care to those unable to pay, the quality of its caring, which is exceptional.

I have also been actively involved on various boards at the University of Pennsylvania, with a focus on helping today's student through mentoring and other counselling programs. Many female students I have counselled are on scholarship and need the active support and encouragement of a role model to help them pursue their education, and I feel I have been a constructive influence for many such women.

Recently, I have become a leading contributor of time and energy to the civic project known as Avenue of the Arts, Inc., which is a non-profit corporation dedicated to developing a cultural district in center city Philadelphia. I am the vice chairman of the board of directors and play a leadership role in this entity, which will enhance economic development that will improve economic conditions in the adjacent neighborhood and the city at large.

At a time when our public schools are tempted to curtail arts programs due to fiscal constraints, many of our citizens are looking to Avenue of the Arts to help instill an appreciation for the arts in our children through many educational programs to be sponsored there and a new High School for the Creative and Performing Arts to be constructed. This project will have an impact on our city for years to come.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge

to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership, what you have done to try to change these policies?

I do not belong to any organization that discriminates on the basis of race, sex or religion in its admission policies. The golf club to which I belong does impose some distinctions between men and women in policies regarding usage of club facilities.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

The selection commission established in my jurisdiction by Senator Harris Wofford recommended me, along with four other candidates, for nomination as a result of a formal selection process. In early June, I contacted the Chairman of the Commission, President Patricia McPherson of Bryn Mawr College, to obtain the application form to be completed for submission in order to be considered for this position. I submitted a complete application and was contacted for an interview, which consisted of a one-half hour interview with two members of the Commission. Thereafter, I was contacted for a further interview before the entire Commission, which took place on July 6, 1993. Thereafter, I believe that the Commission provided Senator Wofford with my name and the names of other individuals from whom he would select a nominee. On July 27, 1993, Senator Wofford recommended me to the President for this judicial position. Investigations conducted by the Federal Bureau of Investigation and the American Bar Association have been completed, and I was interviewed by attorneys at the Justice Department in Washington in early November.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "Judicial activism."

The role of the federal judiciary within the federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

The role of the federal judiciary is limited by the Constitution, and the separation of powers which is its hallmark, to the interpretation and enforcement of existing laws. In the process of such interpretation and enforcement, the role of the federal district courts is further limited by the nature of their jurisdiction, which is limited jurisdiction under Article III of the Constitution, and established precedent, which is controlling. The district court judge is charged with the resolution of distinct matters at issue before him or her in this context. The judge must resolve only those issues before him or her and not seek to solve problems or craft solutions broader than necessary to the resolution of the instant matter. The expansion of jurisdictional limits or modification of principles of jurisprudence is a matter for the legislature, not the judiciary, to undertake.

Exhibit A**Significant Litigated Matters**

My trial experience has been gained primarily, although not exclusively, in the bankruptcy court system, in which the "case" is a reorganization proceeding, and adversary matters, sometimes involving actual trials, are heard by the court. I have litigated in the bankruptcy courts locally and throughout the country in at least 35 cases. The following are examples from ten cases in which matters raised by motion or complaint were litigated by me, except as noted, as sole trial counsel, several of which resulted in reported decisions.

1. Bartholomew, et al. v. Northampton National Bank, et al.
[United States District Court for the Eastern District of Pennsylvania, Civil Action No. 64-1940 (1975); United States Court of Appeals for the Third Circuit, No. 77-2217 (1978)]

Summary

Suit by purchaser of vacation lot against banks who financed purchase, on basis of Truth-in-Lending, Interstate Land Sales Full Disclosure Act, and usury law violations.

Client

One of the defendants, American Bank and Trust Co. of Pa. (now Meridian Bank).

Issues Litigated

Whether: (i) financing of the purchase of a vacation lot was the loan or use of money for purposes of usury law violations; (ii) banks that finance a purchase of a lot are held liable for violations of the Interstate Land Sales Full Disclosure Act; and (iii) Truth in Lending Act violations could be asserted after one year from the date of the land sale contract. While I did not argue the matter before the District Court or the Third Circuit, I was involved in the legal strategy and was responsible, with counsel for Merchants National Bank, for the pleadings in and briefing of the matter, especially on appeal to the Third Circuit (584 F.2d 1288).

(continued)

Significance of Issues/Ultimate Disposition

The court decided in the negative as to all of the issues referred to above, issues of great significance to banks and other entities that finance such purchases, granting summary judgment in favor of our client.

Judge

Hon. John P. Fullam, Judge, United States District Court for the Eastern District of Pennsylvania.

Hon. James Hunter, III, Judge, authored opinion for United States Court of Appeals for the Third Circuit.

Other Counsel

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Philadelphia, PA 19103

2. In re Winslow Center Associates
[United States Bankruptcy Court for the Eastern District of Pennsylvania, Bky. No. 82-00020-G; Adv. No. 82-2662]

Summary

Chapter 11 proceeding of New Jersey partnership which owned a shopping center.

Client

Provident Mutual Life Insurance Company, the mortgagee.

Issues Litigated

- (1) Relief from Stay requested based upon erosion of secured creditor's equity cushion. 32 B.R. 685 (Bankr. E.D. Pa. 1983); relief granted.
- (2) Rights of secured creditor to post-petition rentals recognized under title theory. 50 B.R. 679 (Bankr. E.D. Pa. 1985).
- (3) Objected to debtor's attorney's request for fees from assets subject to mortgagee's lien. 57 B.R. 317 (Bankr. E.D. Pa. 1986); payment of fees denied.

Significance of Issues/Ultimate Disposition

Decision relating to the extent of the interest of the mortgagee in post-petition rents as cash collateral was one of the first such decisions decided under New Jersey law; this issue thereafter became the subject of much litigation in our district and elsewhere, commencing with the case of In re T.M. Carlton House Partners, Ltd., 91 B.R. 349 (Bankr. E.D. Pa. 1988), and addressed most recently by U.S. District Court Judge Bartle in In re SeSide Co., Ltd., 152 B.R. 878 (E.D. Pa. 1993). Also, the decision has often been cited for its limitation of the ability of debtor to charge fees against secured creditors' collateral to only those fees that benefitted secured creditor.

Our client was granted relief from the stay and proceeded to foreclose on its collateral. Also, it was able to collect and apply rents from the shopping center tenants to reduce the debt due to it.

Judge

Hon. Emil F. Goldhaber, Chief Judge, United States Bankruptcy Court for the Eastern District of Pennsylvania.

(continued)

Other Counsel

Counsel for Committee of Equity Holders:

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 (215) 546-4370

Counsel for Trustee:

Robert H. Levin, Esquire
 Adelman Lavine Gold & Levin, PC
 1900 Two Penn Center Plaza
 Philadelphia, PA 19102-1799
 (215) 568-7515

:

3. In re Reading Tube Corporation and Lash Holdings Limited, Debtors. [United States Bankruptcy Court for the Eastern District of Pennsylvania, Case Nos. 87-00429-T and 87-00430-T.]

Summary

Chapter 11 proceeding of copper tube manufacturer.

Client

Meridian Bank, primary secured creditor, as well as the government agencies participating in its loan.

Issues Litigated

(1) Challenged propriety of debtor-in-possession financing where debtor failed to prove that it had searched for available financing elsewhere; financing denied. 72 B.R. 329 (Bankr. E.D. Pa. 1987).

(2) Initiated and litigated Motion for Appointment of a Trustee based upon allegations of fraud, mismanagement and self-dealing of company's shareholders. Discovery ruling reported at 73 B.R. 99 (Bankr. E.D. Pa. 1987).

Significance of Issues/Ultimate Disposition

The Motion for Appointment of a Trustee became a trial of issues of alleged fraud and gross mismanagement conducted on an expedited basis, with discovery encompassing 20 to 25 days over 3 months and the trial itself lasting for several days during a 3-week period in May 1987. Extensive expert testimony as to financial dealings was presented. The matter was settled before conclusion of the trial, paving the way for the plan of reorganization with favorable treatment of our client's claims, and release of all claims against our client, including lender liability.

Judge

Hon. Thomas M. Twardowski, Bankruptcy Judge, United States Bankruptcy Court for the Eastern District of Pennsylvania.

Other Counsel

Debtor's Litigation Counsel:
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(continued)

Debtor's Bankruptcy Counsel:
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For Creditors Committee:
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For Union/Employees' Committee:
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(215) 655-7200

4. In re Dominica V. Civitella [United States Bankruptcy Court for the Eastern District of Pennsylvania, Case No. 80-01083K]

Summary

Chapter 11 proceeding of apartment complex.

Client

The debtor.

Issues Litigated

Rebuffed constant attempts of three secured creditors to cause case to be dismissed, converted, or to file their own plan of reorganization.

Successfully reorganized debtor and distributed one hundred cents on the dollar to unsecured creditors in Plan of Reorganization.

Resulted in frequently-cited reported decision holding that Disclosure Statement must be based on statements of fact, not opinion. 14 B.R. 151 (Bankr. E.D. Pa. 1981); reconsideration denied, 15 B.R. 206 (Bankr. E.D. Pa. 1981).

Significance of Issues/Ultimate Disposition

The client was a widow whose son was managing the complex. The personal, business, legal and strategic aspects were very challenging. The secured creditors were extremely aggressive and constantly commencing litigation to try to take over the property. We were able to prevail over them and confirm a plan providing 100% payment for creditors -- a rare result in a bankruptcy case.

Judge

Hon. William King, Judge, United States Bankruptcy Court for the Eastern District of Pennsylvania.

(continued)

Other Counsel

(Each of the following represented a secured creditor)

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 Blank, Rome, Comisky & McCauley
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5. In re Ram Manufacturing Inc. and Ampro Corp., Debtors
 [United States Bankruptcy Court for the Eastern District of
 Pennsylvania, Bky. Nos. 83-00101-G and 83-00102-G; Adv. No.
 83-0539-G]

Summary

Chapter 11 proceeding of electronics manufacturer.

Client

Meridian Bank, secured creditor.

Issues Litigated

Whether Meridian was entitled to relief from stay due to lack of adequate protection. 32 B.R. 960 (Bankr. E.D. Pa. 1983); reconsideration denied 36 B.R. 822 (Bankr. E.D. Pa. 1984).

Significance of Issues/Ultimate Disposition

The bankruptcy court found that accounts receivable arising from pending lawsuits were too uncertain to be considered for purposes of adequate protection, and proper valuation standard for company which had ceased operations was distress value. Given the lack of adequate protection and lack of debtor's equity in the property, relief from the stay was granted our client so it could proceed to foreclose on the property.

Judge

Hon. Emil F. Goldhaber, Chief Judge, United States Bankruptcy Court for the Eastern District of Pennsylvania.

Other Counsel

For debtor:
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 Rutter, Solomon & DiPiero
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For trustee:
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6. In re Center for the Blind [United States Bankruptcy Court for the Eastern District of Pennsylvania, Case No. 79-818-EG]

Summary

Chapter 11 proceeding of non-profit corporation serving the blind.

Client

The debtor.

Issues Litigated/Significance of Issues/Ultimate Disposition

This case was not adversarial, but was unique in that we confirmed a plan providing for the transfer and continuation of the Center's endowment, subject to Orphan's Court approval (which was obtained) intact for the benefit of the intended beneficiaries, i.e., the blind, and payment to unsecured creditors of approximately fifteen cents on the dollar.

Judge

Hon. Emil F. Goldhaber, Chief Judge, United States Bankruptcy Court for the Eastern District of Pennsylvania.

Other Counsel

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For Attorney General, Commonwealth of Pennsylvania:
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(Current address unknown)

For Unsecured Creditors:
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7. In re Philadelphia Athletic Club [United States Bankruptcy Court for the Eastern District of Pennsylvania, Bky. No. 80-02028-G; Adv. No. 82-0146-G]

Summary

Chapter 11 proceeding of athletic club facility in Center City Philadelphia.

Client

Trustees of Central States, Southeast and Southwest Areas Pension Funds, Victor Palmieri & Co. as Investment Manager, primary secured creditor.

Issues Litigated

Initiated a motion for relief from the stay and entered into a stipulation providing for automatic relief from stay upon the happening of certain events. Upon defaults by the debtor, relief from stay was to be automatically enforceable. Debtor failed to make a timely payment and contested such immediate relief in an injunction proceeding. 20 B.R. 322 (Bankr. E.D. Pa. 1982).

Significance of Issues/Ultimate Disposition

The court gave effect to the terms of the Stipulation, giving automatic relief to our client, which then foreclosed on this major real estate asset at a sheriff's sale.

The court's opinion is often cited as authority for enforcement of court-approved stipulations, especially relating to relief from stay for secured creditors otherwise forestalled from executing on property which constitutes their collateral. The case was perhaps the first of a long line of cases involving single-asset debtors where the courts have been viewing the rights of single-asset real estate debtors somewhat more summarily than those of other complex businesses in need of reorganization.

Judge

Hon. Emil F. Goldhaber, Chief Judge, United States Bankruptcy Court for the Eastern District of Pennsylvania.

(continued)

Other Counsel

Debtor's Counsel:

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Counsel for Trustee:

Melvin Lashner, Esquire
Lashner & Lashner
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8. In re Bates Energy Corp. [United States Bankruptcy Court for the Northern District of Ohio, Case No. B-86-476-Y]

Summary

Objection of creditor client, the Bethlehem Corporation, to the proposed sale of assets of Bates Energy Corp. in Chapter 11 proceedings

Client

Bethlehem Corporation, a major unsecured creditor.

Issues Litigated

Client believed that the proposed sale of assets was for the benefit of insiders of the company. I traveled to Youngstown, Ohio in June of 1986 on a few days' notice and put on a case during four days of hearings to try to show insider dealings and preferences, sham transactions, undercapitalization, and detriment to creditors.

Significance of Issues/Ultimate Disposition

The court approved the sale over objection. Court approval of a sale of assets of a debtor company presents a difficult predicament for a bankruptcy judge where the court is to examine with scrutiny transactions involving insiders, but the company has little prospect for reorganization without such a sale. While the case itself may not appear to be significant, what was significant at the time, and since that time, was the fact that I put on a substantial case to prove insider dealing on a few days' notice, without the luxury of depositions, discovery and the like. Notwithstanding the fact that I was not successful, I believe I raised serious doubts about the sale that should have been sufficient to warrant its not being approved.

Judge

Hon. William T. Bodoh, Judge, United States Bankruptcy Court for the Northern District of Ohio.

(continued)

Other Counsel

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9. In re Marta Group [United States Bankruptcy Court for the Eastern District of Pennsylvania, Bky. No. 83-01276-G; Adv. No. 83-1145-G]

Summary

Chapter 11 debtor of appliance wholesale cooperative.

Client

Emerson Quiet Kool Corporation, seller/consignor of appliances to the debtor.

Issues Litigated

The validity of consignment and/or secured creditor relationship as between Emerson Quiet Kool and the debtor.

Significance of Issues/Ultimate Disposition

The court was called on to determine who should suffer the consequences of an improperly filed financing statement: the debtor, who contributed to the improper filing by dealing with Emerson under a prior name, or the secured creditor, who should have made certain that its interest could be determined from a search of relevant records. The court determined that the onus should be imposed on the secured creditor, who had the burden of showing that the discrepancy in debtor's name was not "seriously misleading." Also, consigned goods delivered after notice of filed financing statements are not property of the estate. 33 B.R. 634 (Bankr. E.D. Pa. 1983)

Judge

Hon. Emil F. Goldhaber, Chief Judge, United States Bankruptcy Court for the Eastern District of Pennsylvania.

Other Counsel

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(continued)

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Counsel for other secured creditor:
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10. Schweibert v. Schweibert [Philadelphia Court of Common Pleas, September Term, 1975; No. 4769; Civil Action - Equity]

Summary

Suit in the Court of Common Pleas of Philadelphia County by a wife against her psychiatrist husband for enforcement of the terms of a separation agreement.

Client

Defendant husband.

Issues Litigated

The matter was ultimately settled, but not without substantial discovery and negotiation involving the interplay of equity, domestic relations, and the meaning of legal terms and conditions in accordance with their intent.

Significance of Issues/Ultimate Disposition

The legal issues were less significant than the learning experience for me, personally, to be dealing with a dispute of this nature in a commercial context. The matter was ultimately satisfactorily resolved by negotiation of a definitive agreement that had the clarity lacking in the originally negotiated separation agreement. The significance to the client was probably much greater than the significance of any other matter I have worked on.

Judge

Hon. Calvin Wilson, Judge of the Court of Common Pleas for the County of Philadelphia.

Other Counsel

Jerome Charen, Esquire
(current address unknown)

revised in LAN 12/3/93 1:45 pm

FORMER NAME: WF5:[BROU.MOR.CV]CONFEXP.XXX FINAL 10/05/93

AO-10
Rev. 1/93

FINANCIAL DISCLOSURE REPORT

Report Required by the Ethics
Reform Act of 1995, Pub. L. No.
104-194, November 30, 1995
(5 U.S.C.A. App. 5, §§101-112)

1. Person Reporting (Last name, first, middle initial) RENDELL, Marjorie O.		2. Court or Organization United States District Court for the Eastern District of Pennsylvania		3. Date of Report 11/29/93
4. Title (Article III Judges indicate active or senior status; Magistrate Judges indicate full- or part-time) Judge, United States District Court for the Eastern District of Pennsylvania		5. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nominating, Date 11/19/93 <input type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final		6. Reporting Period 1/1/92 - 11/1/93
7. Chambers or Office Address Duane, Morris & Heckscher One Liberty Place, 42nd Floor Philadelphia, PA 19103-7396		8. On the basis of the information contained in this Report, it is, in my opinion, in compliance with applicable laws and regulations _____ Revising Officer Signature _____		

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts,
marking the NONE box for each section where you have no reportable information. Sign on last page.

I. POSITIONS. (Reporting individual only; see pp. 7-8 of Instructions.)

POSITION

NAME OF ORGANIZATION/ENTITY

☐

NONE (No reportable positions)

PLEASE SEE ATTACHMENT

II. AGREEMENTS. (Reporting individual only; see p. 8-9 of Instructions.)

DATE

PARTIES AND TERMS

☐

NONE (No reportable agreements)

9/1/93

(c) On or about September 1, 1993: Oral agreement

between Duane, Morris & Heckscher and Marjorie O.

Rendell, whereby Duane, Morris & Heckscher

(continued on ATTACHMENT)

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 9-12 of Instructions.)

DATE

SOURCE AND TYPE

GROSS INCOME
(yours, not spouse's)

(Honorary only)

☐

NONE (No reportable non-investment income)

1	1/1 -12/31/92	Duane, Morris & Heckscher Partner (gross) compensation	\$ 179,662.00
2	1/1 -10/31/93	Duane, Morris & Heckscher Partner (gross) compensation	\$ 133,333.30
3		City of Philadelphia Compensation to Mayor (S)	\$
4		(continued on ATTACHMENT)	\$
5			\$

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting
RENDELL, Marjorie O.Date of Report
11/29/93

IV. REIMBURSEMENTS and GIFTS - transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp.13-15 of instructions.)

SOURCE

DESCRIPTION

☐ NONE (No such reportable reimbursements or gifts)

1 NOT APPLICABLE

1		
2		
3		
4		
5		
6		
7		
8		

V. OTHER GIFTS. (Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp.15-16 of instructions.)

SOURCE

DESCRIPTION

VALUE

☐ NONE (No such reportable gifts)

1 NOT APPLICABLE

1		\$
2		\$
3		\$
4		\$
		\$

VI. LIABILITIES. (Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp.16-18 of instructions.)

CREDITOR

DESCRIPTION

VALUE CODE*

☐ NONE (No reportable liabilities)

1	Meridian Bank (J)	Line of Credit; personal	J
2	Meridian Bank (J)	Line of Credit; campaign debt	J
3	Cape Savings Bank (J) (refinanced by	One-half of mortgage on	L
4	Home Savings Bank in May 1992)	vacation duplex (one unit used as vacation home; one rented to others)	
5			
6			
7			

* VALUE CODES: J = \$15,000 or less L = \$15,001 to \$50,000 T = \$50,001 to \$100,000 M = \$100,001 to \$250,000
 S = \$250,001 to \$500,000 D = \$500,001 to \$1,000,000 P = more than \$1,000,000

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

RENDELL, Marjorie O.

Date of Report

11/29/93

VII. INVESTMENTS and TRUSTS - Income, value, transactions. (Includes those of spouse and dependent children; see pp. 18-37 of Instructions.)

1. Name of Asset (including trust name) Indicate, where applicable, whether it is a joint asset, a trust, a partnership, an individual and spouse, or a partnership of spouse and dependent children by September 30th of the reporting period.	2. Income during reporting period		3. Current value at end of reporting period		4. Transactions during reporting period					
	(A) Div (1-4)	(B) Div (1-4)	(C) Div (1-4)	(D) Div (1-4)	(E) Div (1-4)	(F) Div (1-4)	(G) Div (1-4)	(H) Div (1-4)	(I) Div (1-4)	
NONE (No reportable income, assets, or transactions)										
CONTINUATION PAGE										
11 Maridian Bancorp (dc)	A	div	J	T						
12 KP Cash Reserve Money Mkt (dc)	A	div	J	T						
13 5034 Asbury Avenue Ocean City, NJ (J)	E	rent	M	W						
14 Duane, Morris & Heckacher capital account	D	int	L	U						
15 401-K at Vanguard Fiduciary Co., Valley Forge		NONE	K	T						
16 HR-10 Provident Capital Mgmt., Inc., Phila.		NONE	N	T						
17 IRA - National Home Life Assurance Co.		NONE	D	T						
18 IRA - Delaware Group (S)		NONE	D	T						
19 401-K at Vanguard (S)		NONE	D	T						
20 IRA - National Home Life Assurance Co. (S)		NONE	D	T						
21										
22 Trusts: See ATTACHMENT										
23										
24										
25										
26										
27										
28										
29										
30										
31										

1 Income/Gain Codes: A-\$1,000 or less B-\$1,001 to \$3,500 C-\$3,501 to \$5,000 D-\$5,001 to \$15,000 E-more than \$15,000
(See Col. B1 & B4) F-\$15,001 to \$35,000 G-\$35,001 to \$100,000 H-\$100,001 to \$1,000,000 I-more than \$1,000,000
2 Value Codes: J-\$11,000 or less K-\$11,001 to \$35,000 L-\$35,001 to \$100,000 M-\$100,001 to \$1,000,000 N-more than \$1,000,000
(See Col. C1 & C2) O-\$100,001 to \$1,000,000 P-\$1,000,001 to \$1,000,000 Q-\$1,000,001 to \$1,000,000
3 Value Method Codes: C-Appraisal D-Cost E-Cost (real estate only) F-Assessment G-Cash/Market
(See Col. C2) H-Book Value I-Other J-Estimated

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

RENDELL, Marjorie O.

Date of Report

11/29/93

VIII. ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate part of Report.)

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C.A. app. 7, § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature

MARJORIE O. RENDELL

Date 11/29/93

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C.A. APP. 6, § 104, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Judicial Ethics Committee
Administrative Office of the
United States Courts
Washington, DC 20544

Marjorie O. Rendell

Attachment to
Financial Disclosure Report
dated November 29, 1993

I. POSITIONS.

Director:	Philadelphia Bar Foundation Academy of Vocal Arts Avenue of the Arts, Inc. East Falls Advisory Board of the Chestnut Hill National Bank Market Street East Improvement Association Pennsylvania's Campaign for Choice Philadelphia Friends of Outward Bound Visiting Nurse Association of Greater Philadelphia Visiting Nurse Society
Associate Trustee:	University of Pennsylvania, by reason of serving on the Athletic Advisory Board
Officer:	Visiting Nurse Association of Greater Philadelphia (Vice Chair) Avenue of the Arts, Inc. (Vice Chair)
Partner:	Duane, Morris & Heckscher

II. AGREEMENTS.

(continued) is to pay to Marjorie O. Rendell, upon withdrawal from partnership, a termination payment equal to the average compensation received by her in calendar years 1991 and 1992 (approximately \$200,000), in one lump sum, or in two annual installments, at her option; terms now being reduced to writing. Partnership capital of Marjorie O. Rendell will also be returned upon withdrawal.

Marjorie O. Rendell

Attachment to
Financial Disclosure Report
dated November 29, 1993

III. NON-INVESTMENT INCOME.

(continued)

Honoraria:

I was offered two honoraria during the reporting period, both of which were given instead, at my request, to Avenue of the Arts, Inc. (a non-profit entity which is developing a cultural district in Center City Philadelphia), as follows:

Phi Beta Kappa Society, Philadelphia Chapter	5/92	\$100.00
Newcomers Club, Bryn Mawr, PA	9/93	\$125.00

As Mayor of Philadelphia, my spouse has been offered honoraria on many occasions during the reporting period. He did not accept any honoraria during such period, but requested instead that contributions be made to the City of Philadelphia's Department of Recreation or to Avenue of the Arts, Inc.

VII. INVESTMENTS AND TRUSTS.

While reporting person and spouse believe they are residual/contingent beneficiaries of two family trusts, they have no current beneficial interests in, and receive no current income (or principal) distributions from, either of such trusts.

FINANCIAL STATEMENT

MARJORIE O. RENDELL

October 31, 1993

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks	18,500			Notes payable to banks—secured *	7,000		
U.S. Government securities—add schedule				Notes payable to banks—unsecured			
Listed securities—add schedule (Sched. 1)	89,447			Notes payable to relatives			
Unlisted securities—add schedule				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due			
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid tax and interest			
Doubtful				Real estate mortgages payable—add schedule (Sched. 2)	340,000		
Real estate owned—add schedule (Sched. 2)	560,000			Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts—itemize:			
Automobile and other personal property	25,000						
Cash value—life insurance							
Other assets—itemize:							
ERISA/IRA Plans	93,000						
Partnership Capital	56,000						
				Total Liabilities	347,000		
				Net Worth	394,947		
Total Assets	1,241,947			Total Liabilities and net worth	1,241,947		
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, cosigner or guarantor	0			Are any assets pledged? (Add schedule.)	no		
On leases or contracts	0			Are you defendant in any civil or legal actions?	no		
Legal Claims	0			Have you ever taken bankruptcy?	no		
Provision for Federal Income Tax	0						
Other special debt	0						

* \$25,000 home equity line of credit availability at Meridian Bank

SCHEDULE 1Securities - Values as of 10/31/93Marjorie O. Rendell

American Telephone & Telegraph	(Common Stock)	\$ 11,500.00
General Electric	(Common Stock)	19,400.00
Massachusetts Housing Finance Agency (Dec. 1998)	(Municipal Bonds)	6,249.40
Massachusetts Housing Finance Agency (Dec. 2000)	(Municipal Bonds)	5,286.50
Prince Georges County, Maryland (Dec. 1997)	(Municipal Bonds)	6,778.10
Public Service Enterprise Group	(Common Stock)	6,725.00
		<hr/>
		\$ 55,939.00

Marjorie O. RendellAs Custodian for Jesse T. Rendell (dependent child)

Huffy Corp.	(Common Stock)	\$ 647.63
Kidder Peabody Government Income Fund	(Mutual Fund)	2,627.96
Kidder Peabody Equity Income Fund	(Mutual Fund)	5,174.69
Meridian Bancorp	(Common Stock)	3,050.00
Toys 'R' Us	(Common Stock)	2,808.75
		<hr/>
		\$14,309.03

(continued)

Edward G. Rendell (spouse)
As Custodian for Jesse T. Rendell (dependent child)

Certificate of Accrual of Treasury Security (due November 1998)	(Government Bond)	\$ 3,870.35
E. I. DuPont de Nemours	(Common Stock)	4,762.50
Huffy Corp.	(Common Stock)	981.25
Meridian Bancorp	(Common Stock)	3,050.00
		<hr/>
		\$12,664.10

Edward G. and Marjorie O. Rendell (jointly)

DMC Tax Free Income Trust	(Mutual Fund)	\$ 3,124.00
Municipal Investment Trust:		
Pennsylvania series 14	(Unit Trust)	2,872.20
Pennsylvania series 13	(Unit Trust)	538.38
		<hr/>
		\$ 6,534.58

SCHEDULE 2Real Estate Owned and Mortgages

	<u>Property</u>	<u>Value</u>	<u>Mortgage</u>
a.	3425 Warden Drive Philadelphia, PA	\$210,000	\$160,000
b.	5032 Asbury Avenue	\$170,000)	
	5034 Asbury Avenue	\$180,000)	\$180,000
	Ocean City, NJ		

Both mortgages held by
United Savings Bank, Philadelphia, PA

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former name used.)

Thomas Ignatius Vanaskie

2. Address: List current place of residence and office address(es).

Current Place of Residence:

Office Address:

Clarks Green, PA

Elliott, Vanaskie & Riley
600 Penn Security Bank Bldg
127 N. Washington Ave.
Scranton, PA 18503

3. Date and place of birth.

November 11, 1953
Shamokin, PA

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

I am married to the former Dorothy ("Dot") G. Williams. Dot is currently a part-time student at Keystone Junior College in LaPlume, PA. She devotes a substantial amount of her time to matters involving our children at our Lady of Peace School in Clarks Green, Pennsylvania.

5. Education: List each college and law school you

have attended, including dates of attendance, degrees received, and dates degrees were granted.

College:

1971 to 1975--Lycoming College, Williamsport, PA
B.A., Magna Cum Laude, May, 1975

Law School:

1975 to 1978--Dickinson School of Law, Carlisle, PA
J.D., Cum Laude, June 1978

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Summer of 1975 - following the completion of college and prior to the start of law school, I worked as a construction laborer. I cannot recall the name of the firm by which I was employed.

Summer of 1976 - Internship as law clerk to the Honorable Genevieve Blatt, Pennsylvania Commonwealth Court, Harrisburg, PA, and internship at the Dickinson School of Law Library, Carlisle, PA.

1976 to 1977 School Year - Internship in the Law Bureau of the Pennsylvania Public Utility Commission, Harrisburg, PA.

Summer of 1977 - Summer Associate at Dilworth, Paxson, Kalish & Kauffman, Philadelphia, PA

1977-1978 School Year - Legal Research Consultant to Clarence D. Bell (Delaware County), Minority Chairman of the Consumer Affairs Committee, State Senate, Harrisburg, PA.

September, 1978 to September 1980 - Law Clerk to the Honorable William J. Nealon, then Chief Judge of the United States District Court for the Middle District of Pennsylvania.

September, 1980 to January 1986 - Associate in the Scranton Office of Dilworth, Paxson, Kalish & Kauffman.

January 1, 1986 through March 19, 1992 - Partner, Dilworth, Paxson, Kalish & Kauffman. (In charge of the firm's Scranton office since January, 1987.)

March 20, 1992 to the Present - Vice-President and Member of the Board of Directors of Elliott, Vanaskie & Riley, a Partnership of Professional Corporations, in charge of its Scranton, PA Office.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

I have not had any military service.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

M. Vashti Burr Award - Scholarship given annually by the Dickinson School of Law's faculty to the student deemed to be "most deserving" having in mind his economic needs and the excellence of his industry and scholarship.

"Book Award" for highest grade in Torts I.

Member of the Dickinson Law Review Editorial Staff - Selection based upon ranking in the top ten percent of my class after the first year of law school. (Final rank was fourth in class of 140 students.)

Member of the Dickinson Law School Appellate Moot Court Board - Selection based upon performance in legal writing and appellate moot court practice.

Member of the Dickinson School of Law International Law Moot Court Team - Selection based upon academic performance.

Member of the Dickinson School of Law's Woolsack Society - membership based upon outstanding academic achievement.

Article published in the inaugural edition of the American Students of International Law Society

International Law Journal - Selection based upon competitive writing process.

1974 - James A. Finnegan Award - The highest award given by the James A. Finnegan Fellowship Foundation. Selection is based upon a competitive essay contest, academic performance, and personal recommendations. The award provided a six week internship with a state governmental agency in Harrisburg, PA.

1974-1975 - Member and President of the Lycoming College Chapter of Omicron Delta Epsilon, a National Economics Honor Society.

1975 to present - Member of Phi Kappa Phi Honor Society.

1975 - Lycoming College "Chieftain Award" - Given annually to the College Senior who, in the opinion of the students and faculty, had contributed the most to Lycoming College through support of school activities; had exhibited outstanding leadership qualities; had worked efficiently and effectively with the members of the college community; had evidenced a good moral code; and whose academic rank was in the upper half of the senior class. (Graduated Magna Cum Laude with a G.P.A. of 3.87/4.00, majoring in political science with a concentration in economics.)

1975 - Lycoming College "Tomahawk Award" - Given annually to the "outstanding male athlete" at Lycoming College.

1974 - Selected to the First Team of the College Division Academic All-American Football Team; First Team of the Middle Atlantic Conference Football Team; Honorable Mention on the Associated Press All American Football Team, College Division; Honorable Mention on the Associated Press All State Football Team for both colleges and universities; Honorable Mention on the Associated Press All East Football Team in the College Division.

1993 - Inducted into the Shamokin, Pennsylvania Chapter of the Pennsylvania Sports of Hall of Fame.

1990 - Selected as a Member of "Who's Who in Practicing Attorneys."

1993 - Recipient of the Our Lady of Lourdes

Regional High School Alumni Association Board of Governors' Award for significant contributions to the alumni organization.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

I am a member of the following bar associations and professional organizations:

Lackawanna Bar Association
 Pennsylvania Bar Association
 American Bar Association
 Pennsylvania Trial Lawyers Association
 American Trial Lawyers Association
 Northeastern Pennsylvania Trial Lawyers Association
 Federal Bar Association
 American Judicature Society

I have served as Chair of the Continuing Legal Education Committee of the Lackawanna Bar Association from 1991 to the Present.

I was elected a member of the Board of Directors of the Lackawanna Bar Association in 1993.

In 1993, I was appointed as a member of the Board of Directors of the Northeast Pennsylvania Trial Lawyers Association.

In 1992, I was appointed to the Lawyers' Advisory Committee for the United States District Court for the Middle District of Pennsylvania.

In 1993, I was appointed to the Civil Justice Reform Act Committee for the United States District Court for the Middle District of Pennsylvania.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

American Bar Association, Pennsylvania Bar Association, Pennsylvania Trial Lawyers Association and American Trial

Lawyers Association are active in lobbying before public bodies.

I served as President of Our Lady of Lourdes Regional High School Alumni Association from its establishment in 1990 to May, 1993. I remain a member of the Board of Governors of the Alumni Association.

I am a member of the Glen Oak Country Club, Clarks Summit, PA, and of the Paupack Hills Golf & Country Club, Greentown, PA.

Through my firm, I maintain memberships in the Scranton Area Chamber of Commerce, the Scranton Area Foundation, and the Economic Development Council of Northeastern Pennsylvania.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

November 27, 1978 - Pennsylvania Supreme Court.

November 3, 1980 - United States District Court for the Middle District of Pennsylvania.

March 25, 1982 - United States District for the Eastern District of Pennsylvania.

June 16, 1982 - United States Court of Appeals for the Third Circuit.

April 18, 1983 - The Supreme Court of the United States.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Comment, The State Sovereignty Doctrine Since National League of Cities v. Usery: A New Constitutional Interpretation under the Commerce Clause, 81 DICK.L.REV. 599 (1977).

The European Patent Convention: State Sovereignty Surrendered to Establish a Supranational Patent, 1 ASILS INTERNAT'L L.J. 73 (1977).

I provided the "Civil Practice Update" at the 1990 Lackawanna County Bench Bar Conference. The materials I prepared in connection with that conference consisted of case summaries covering approximately 100 decisions involving civil litigation matters under both Federal and State law announced in the previous 12 months.

In December of 1990 I provided a lecture titled "Federal Practice Update" at a seminar sponsored by the Pennsylvania Trial Lawyers Association in Scranton, Pennsylvania.

In December of 1992 I made a presentation on the subject of "Trial Preparation" at a seminar sponsored by the Pennsylvania Trial Lawyers Association.

Two Copies of the law review articles and one copy of the course materials I prepared accompany this questionnaire.

13. Health: What is the present state of your health?
List the date of your last physical examination.

Excellent
June 29, 1993

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

None.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3)

citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Not applicable.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

None.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

Sept. 1978 to Sept. 1980 - Law Clerk to the Hon. William J. Nealon, then Chief Judge of the U.S. District Court for the Middle District of Pennsylvania.

2. whether you practiced alone, and if so, the addresses and dates;

I have not been engaged in the practice of law by myself.

3. the dates, names and addresses of law firms or offices, companies or governmental

agencies with which you have been connected, and the nature of your connection with each;

September, 1980 through December, 1985 - Associate in the Scranton, PA office of Dilworth, Paxson, Kalish & Kauffman. Our Scranton address was 600 Penn Security Bank Bldg., 127 N. Washington Ave., Scranton, PA.

January 1, 1986 to March 19, 1993 - Partner in the Scranton Office of Dilworth, Paxson, Kalish & Kauffman. I was in charge of the Dilworth Scranton office from January 1, 1987 to March 19, 1992.

March 20, 1992 to the Present - Vice-President and member of the Board of Directors of Elliott, Vanaskie & Riley, a Partnership of Professional Corporations, in charge of its Scranton, PA Office.

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

The general character of my law practice has been general civil litigation, with particular emphasis in complex contract, commercial, environmental, employment, and products liability litigation. Prior to 1985 I was involved in some criminal defense matters. Since 1985, however, I have restricted my practice to non-criminal defense matters. A small percentage of my practice has also been devoted to general representation of some small businesses.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

Former clients include:

- Individuals in employment discrimination, trade secret, restrictive covenant, contract, commercial, products liability, and personal injury litigation.
- Closely-held companies in commercial and contract litigation.
- Large publicly held companies in contract, commercial, and products liability litigation.
- American subsidiaries of foreign corporations in environmental, employment, and products liability litigation.
- A municipal authority in contract litigation.
- A legislatively established insurance organization for no-fault automobile insurance benefits in statutory interpretation and insurance coverage litigation.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I have appeared in court frequently, having practiced in each of the three Federal District Courts in Pennsylvania, the Bankruptcy Court for the Middle District of Pennsylvania, the Bankruptcy Court for the Southern District of Florida, the United States Court of Appeals for the Third Circuit, the United States Supreme Court, the Pennsylvania Supreme, Superior and Commonwealth Courts, and the trial

courts in Lehigh, Schuylkill, Northampton, Luzerne, Monroe, Lackawanna, Pike, Wayne, Lancaster, Cumberland, Wyoming, Bradford, Dauphin, Lycoming, Philadelphia and Westmoreland Counties. I have also represented clients in matters pending before the Pennsylvania Environmental Hearing Board and the Pennsylvania Board of Claims.

2. What percentage of these appearances was in:

(a) federal courts;

50%

(b) state courts of record;

45%

(c) other courts.

5%

3. What percentage of your litigation was:

(a) civil;

Since 1985, one hundred percent of my litigation has been civil litigation. Prior to 1985, approximately ninety-five percent of my practice was devoted to civil litigation and five percent of my practice devoted to criminal defense work.

(b) criminal.

See answer to (a).

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled),

indicating whether you were sole counsel, chief counsel, or associate counsel.

I have tried to verdict or judgment in courts of record twelve cases. In four of those cases I served as sole counsel; in six of those cases I served as lead counsel; and in the remaining two cases I served as associate counsel.

I have served as lead counsel in taking over litigation following trials or arbitration hearings in at least six other separate matters. I was involved in the representation of these matters until final judgment.

I have served as lead or sole counsel in approximately twenty cases that went to final judgment based upon case-dispositive motions, with approximately fifteen of those cases decided on the basis of a summary judgment record that included extensive discovery.

Finally, I have served as lead or sole counsel in a number of cases that were settled following the start of trial or after the completion of extensive pre-trial discovery and the final pre-trial conference.

5. What percentage of these trials was:

(a) jury; (b) non-jury.

Of the cases in which I have been involved that have been tried to verdict or judgment, two have been jury trials and ten have been non-jury trials. Approximately six cases were settled following the selection of juries and the commencement of trial.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case.

Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

A. Ragnar Benson, Inc. v. Bechtel Power Corp. 651 F. Supp. 962 (M.D. Pa. 1986), aff'd mem., 833 F.2d 303 (3rd Cir. 1987) - Ragnar Benson, Inc. claimed that Bechtel Power Corporation ("Bechtel") had delayed its construction of cooling towers at the Limerick Nuclear Generating Station, located near Pottstown, Pennsylvania, allegedly resulting in Ragnar Benson incurring substantial cost overruns. I represented Bechtel, which counterclaimed to recover overpayments it had made to Ragnar Benson. Ragnar Benson's claims totaled more than \$750,000. Bechtel's counterclaim sought \$250,000. Litigation involved thousands of records pertaining to construction of the cooling towers over a three year period. The case was tried in May of 1986 to the Honorable R. Dixon Herman of the Middle District of Pennsylvania. I handled the examination and cross-examination of all witnesses, as well as presentation of all arguments and preparation of Requests for Findings of Fact and Post-Trial Briefs. Following a two week trial, Judge Herman rejected Ragnar Benson's claims and awarded judgment in favor of Bechtel on its counterclaim. See 651 F. Supp. 962 (M.D.PA). On appeal, the Third Circuit affirmed, without opinion. Serving as my associate counsel at trial was John L. Heaton, Esq., 521 Transportation and Safety Building, Harrisburg, PA 17120, (717) 787-5473. Opposing counsel was Joseph Conway, Esq., 2510 One PPG Place, Pittsburgh, PA 15222, (412) 471-8300.

B. Czerw v. Grove Manufacturing Company, Docket No. 83-CIV-6005 - Plaintiff's husband was killed when the hydraulic firetruck ladder he was occupying in fighting a fire in Taylor, Pennsylvania contacted a high voltage line. I represented Grove Manufacturing Company, the manufacturer of the ladder. Defense of this claim involved coordination of expert testimony from mechanical

and electrical engineers as well as professional firefighters. Following a two week jury trial in Lackawanna County before the Honorable S. John Cottone in October of 1988, a jury returned a verdict in favor of Grove Manufacturing Company. No appeal was taken. I was lead counsel at trial and conducted examination of all witnesses, jury selection and all arguments. I was assisted by Kevin C. Quinn, Esq. of my firm. Opposing counsel were Patrick E. Dougherty, Esq., Dougherty, Mundy, Leventhal & Price, 459 Wyoming Avenue, Kingston PA 18704, (717) 288-1427, Paul J. Drucker, Esq., Jablon, Epstein, Wolf & Drucker, Bellevue, 9th Floor, 200 S. Broad Street, Philadelphia, PA 19102, (215) 922-7100, and Marianne Gilmartin, Esq., Lenahan & Dempsey, Kane Building, N. Washington Ave., Scranton, PA 18503, (717) 346-2097.

C. Tama v. Llinas, Docket No. 86-13E - I represented Dr. Lawrence Tama in this action to enforce a covenant not to compete in a contract between Dr. Tama and his independent contractor, Dr. Llinas. The defendant claimed the right to pay liquidated damages of \$50,000 in satisfaction of a two year restrictive covenant. Several attorneys had informed Dr. Tama that he could not enforce the restrictive covenant. Following a three day trial in July of 1986, Judge Williams, Senior Judge in Bradford County, enjoined Dr. Llinas from breaching the restrictive covenant. On appeal, the Pennsylvania Superior Court affirmed. Docket No. 00493HBG86 of 1986. I was lead counsel and conducted the examination of all witnesses and arguments to the court. Opposing counsel was Howard Levinson, Esq., Rosenn, Jenkins & Greenwald, 15 South Franklin Street, Wilkes-Barre, PA 18701, (717) 826-5600.

D. United States v. Tabor Court Realty, Scott F. Linde Party to the Agreement of Sale, 943 F.2d 335 (3rd Cir. 1991), cert. denied, 117 L.Ed.2d 413 (1992). - I represented Scott Linde, who had contracted to purchase approximately 600 acres of land in Lackawanna County from the court-appointed Receiver of the Raymond Colliery Companies. The total consideration was approximately \$1.5 million. Linde had conditionally assigned his interests under this Agreement of Sale to Carrier Coal Enterprises. Following a hearing in January of 1989, the Honorable Malcolm Muir of the Middle District of Pennsylvania concluded that the assignment improperly interfered with the court-directed bidding process on the property in question. I represented Linde on appeal to the United States Court of Appeals for the Third Circuit. Carrier Coal Enterprises elected not to appeal. In order to prevail on appeal we had to establish that the

district court had abused its discretion. In October of 1989, the Third Circuit, in an unreported opinion, agreed with our position and reversed and remanded the matter to the district court for further hearings. Following a two day trial in April of 1990, the district court concluded that Linde had not acted improperly in entering into the assignment. There then ensued litigation between Linde and Carrier Coal Enterprises as to whether the Assignment remained in effect. The district court ruled in favor of Linde, but the Third Circuit reversed and remanded the matter once again. See 943 F.2d 335 (3rd Cir. 1991). The Supreme Court denied certiorari. 117 L.Ed.2d 413 (1992). On the second remand the district court found in favor of Carrier Coal Enterprises, and the Third Circuit affirmed without opinion. Opposing counsel were Thomas P. Brennan, Esq., Gallagher, Brennan & Gill, 300 First Eastern Plaza, 60 Public Square, Wilkes-Barre, PA 18701 (717) 824-3208, and Joseph G. Ferguson, Esq., Rosenn, Jenkins & Greenwald, 15 S. Franklin Street, Wilkes-Barre, PA 18701 (717) 826-5600.

E. Eckersley v. WGAL-TV, Inc., 831 F.2d 1204 (3rd Cir. 1987). - This litigation, brought in the Middle District of Pennsylvania under the Employee Retirement Income Security Act, was the sequel to a settlement of litigation in the Eastern District of Pennsylvania concerning Mr. Eckersley's entitlement to a bonus based upon the net profit realized on the sale of a Massachusetts television station. We claimed that the amount received in settlement should be included in the calculation of Mr. Eckersley's retirement pension. Judge Kosik of the Middle District of Pennsylvania ruled in favor of the defendant. On appeal, however, the United States Court of Appeals for the Third Circuit agreed with our position and reversed the district court ruling. See 831 F.2d 1204 (3rd Cir. 1987). Opposing counsel was K. Jane Fankhanel, Esq., Fulbright and Jaworski, 666 Fifth Avenue, 31st Floor, New York, New York 10103, (212) 318-3000.

F. Stark v. Pennsylvania National Mutual Casualty Insurance Company, Docket No. 23 of 1987 - Donna Stark, a member of the Honesdale Borough Police Force, was involved in a high speed chase of a reckless driver. The police cruiser occupied by Officer Stark spun out of control and slammed into a parked vehicle. The vehicle Officer Stark was chasing was uninsured at the time of the accident. We brought an action against the uninsured motorist carrier for the Borough of Honesdale, which defended on the ground that it enjoyed the Borough's workers' compensation immunity. This defense was based upon Pennsylvania Supreme Court precedent pre-dating the

1984 Pennsylvania Motor Vehicle Financial Responsibility Act. In May of 1989, the Hon. Robert Conway of the Court of Common Pleas of Wayne County ruled in favor of the insurance company. We appealed to the Pennsylvania Superior Court (Docket Nos. 01601-PHL-89 and 01602-PHL-89), arguing that the Pennsylvania Supreme Court precedent was no longer applicable in light of the 1974 legislation. The Superior Court agreed, ruling in Officer Stark's favor on this issue in 1990 in an unpublished opinion. The insurance company was unsuccessful in its efforts to have the Pennsylvania Supreme Court hear the case. My representation in this matter began in 1987 and continues to the present. Opposing counsel is Howard Levinson, Esq., of Rosenn, Jenkins & Greenwald, 15 S. Franklin Street, Wilkes-Barre, PA 18701, (717) 826-5600.

G. Allegheny County Sanitary Authority v. United States Environmental Protection Agency, et al., 557 F.Supp. 419 (W.D. Pa. 1983), aff'd, 732 F.2d 1167 (3rd Cir. 1987) - This action was brought in the United States District Court for the Western District of Pennsylvania to determine the entitlement of the Allegheny County Sanitary Authority ("ALCOSAN") to a multi-million dollar grant under the Federal Water Pollution Control Act. A principal issue in this litigation was whether the state environmental agency charged with administering the federal funding program was amenable to suit for alleged violations of the Federal Water Pollution Control Act. In an Opinion reported at 557 F.Supp. 419 (W.D. Pa. 1983), the Hon. Hubert I. Teitelbaum ruled against ALCOSAN. The Third Circuit, in an Opinion reported at 732 F.2d 1167 (3rd Cir. 1984), affirmed the trial court. I served as co-counsel in this litigation with Gov. Robert P. Casey. I was principally responsible for the preparation of the trial and appellate court briefs. Following the Third Circuit decision, I assumed the role of lead counsel in this litigation, which was eventually decided in 1987 on a summary judgment motion. The trial court ruling on the summary judgment motion is not reported. Opposing counsel included Dean Dunsmore, Esq., United States Department of Justice (202) 633-2216; Maxine Woelfling, Esq. (717) 787-3483, now a member of the Pennsylvania Environmental Hearing Board; and James J. Kutz, Esq., Eckert, Seamans, Cherin & Mellott, One South Market Square Building, 213 Market Street, Harrisburg, PA 17701. This matter was handled between 1982 and 1987.

H. Precision National Plating Services, Inc. v. United States Environmental Protection Agency - I served as lead counsel, representing Precision National Plating

Services, Inc. ("Precision"), in litigation concerning the Environmental Protection Agency's "emergency powers" provisions under the Comprehensive Environmental Response, Compensation and Liability Act, as amended ("CERCLA"), and the Safe Drinking Water Act. EPA had threatened to issue unilaterally an Administrative Order that could have resulted in Precision incurring hundreds of thousands of dollars in investigative and remedial actions that were not compelled by any imminent threat to public health or the environment. Initially, we brought an action in the United States District Court for the Eastern District of Pennsylvania for immediate injunctive relief. No. 90-6813. Although ruling against Precision on jurisdictional grounds, the Hon. J. William Ditter expressed sympathy with Precision's "plight," observing that the record revealed that Precision had responded to all reasonable requirements imposed upon it by state environmental agencies and that the matter of which EPA was complaining certainly did not appear to involve an imminent threat to public health or the environment. 1990 W.L. 191968 (E.D. PA 1990). Subsequently, EPA issued an Administrative Order, purporting to exercise its "emergency powers" under both CERCLA and the Federal Safe Drinking Water Act. Because jurisdiction over orders issued under the Safe Drinking Water Act is vested in the appellate courts, we caused to be filed a Petition for Review with the United States Court of Appeals for the Third Circuit. (Docket No. 91-3158.) Following our briefing of issues involving the proper exercise of the "emergency powers" provisions and EPA's authority to effectively enforce compliance with administrative orders through the threat of accrual of substantial monetary penalties, EPA and Precision resolved the dispute in 1991 on terms favorable to Precision yet protective of public health and safety. Opposing counsel was Karen Kellen, Esq., United States Environmental Protection Agency, Region III (3RC22), 841 Chestnut Building, Philadelphia, PA (215) 597-9800.

I. Scranton Redevelopment Authority v. Pennsylvania Department of Transportation. Pa. Board of Claims Docket No. 658 -- This action arose out of condemnation of properties in South Scranton. The Pennsylvania Department of Transportation ("PennDOT") had used the Scranton Redevelopment Authority as a condemnation agency to acquire a number of properties along a proposed right-of-way. PennDOT later scrapped its plans for the highway, and did not sign a proposed written contract with the Scranton Redevelopment Authority for the acquisition of the properties in question. An action was brought before the Pennsylvania Board of Claims, seeking to impose liability on promissory estoppel and contract

theories. PennDOT defended on the ground that no written contract between it and the Redevelopment Authority existed. We were retained following the Board of Claims trial to prepare proposed findings of fact, conclusions of law, and a memorandum of law. I was the principal drafter of our filings, which were submitted in 1983. The Board of Claims ruled in our favor in 1984. The matter was subsequently settled in 1985 on appeal to the Commonwealth Court, resulting in a substantial recovery for the financially distressed City of Scranton. I served as co-counsel on this matter with Governor Robert P. Casey and James W. Brown, Esq. 225 Main Capital Bldg., Harrisburg, PA 17120, (717) 787-5403. Opposing counsel was Spencer Manthorp, Esq., then Chief Counsel for PennDOT, Department of Transportation, Room 313, Transportation & Safety Building (717) 787-2063.

J. Maid Rite Steak Co. v. United States, 643 F. Supp. 1162 (M.D. Pa. 1986). -- I, along with Morey M. Myers, Esq., represented Maid Rite Steak Co. ("Maid Rite") in an action challenging the Internal Revenue Service's denial of Maid Rite's attempt to obtain an investment tax credit. The principal owners of Maid Rite had erroneously claimed the investment tax credit at issue on their personal tax returns. An examination of the owners' tax returns disclosed that the owners were not entitled to the tax credit. Thereafter, Maid Rite attempted to claim the credit, but it was denied by the Internal Revenue Service. I was principally responsible for preparation of a brief in support of our summary judgment motion. The Hon. William J. Nealon ruled in favor of Maid Rite, concluding that the owners had not made a binding irrevocable tax credit election by erroneously and in good faith claiming the investment tax credit themselves. The court also ruled that, even if such election was binding, the Internal Revenue Service abused its discretion in refusing to permit the taxpayers to amend their return. The court's decision is reported at 643 F.Supp. 1162 (M.D.PA 1986). Opposing counsel was Stephen Carlton, (202) 724-6514, United States Department of Justice. Co-counsel was Morey M. Myers, Schnader, Harrison, Segal & Lewis, First Eastern Bank Bldg., Scranton PA (717) 342-6100.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

I served as lead counsel in a Civil RICO action concerning the efforts of a healthcare provider to circumvent Certificate of Need requirements to establish a radiation therapy center. Powers v. Williamsport Hospital, et al. (M.D.Pa., Docket 89-0059) I represented a radiation oncologist whose practice was threatened by the establishment of the competing radiation therapy center. Defendants were represented by prominent Philadelphia, Pittsburgh and Atlanta law firms. I coordinated extensive discovery efforts. The case, along with parallel litigation in the Middle District of Pennsylvania, the Pennsylvania Commonwealth Court, and the Pennsylvania Department of Health, ultimately settled.

A significant litigation matter which settled on the eve of trial was Condella v. Duo Fast Corporation (Lackawanna County, Docket 88-CIV-6187). This was a products liability case in which I represented the plaintiffs. William Condella was severely injured when a nail from a nail gun discharged through his skull, embedding below the scalp line. Fortunately, Mr. Condella had not sustained severe neurological impairment. Extensive discovery yielded information concerning a design defect in the nail gun and negligent conduct on the part of the companies in charge of the construction site. The case was eventually settled under terms that will pay Mr. and Mrs. Condella more than \$4.6 million.

I provided pro bono representation to a local non-profit gymnastics training center in connection with its efforts to secure a building at which to conduct its activities for the youth of this area.

From 1991 to the present I have served as Chair of the Continuing Legal Education Committee of the Lackawanna Bar Association. In that capacity, I developed a program of monthly continuing legal education programs presented to members of the Lackawanna Bar Association. We have also invited students and professors of local universities and colleges to attend our presentations. I have also participated in the development of continuing legal education programs that satisfy the requirements for mandatory continuing legal education on ethics issues.

I have served as a member of the Middle District of Pennsylvania Lawyers' Advisory Committee. The Committee meets with the Chief Judge of the District on a quarterly basis. Members of the Committee also attend the Third Circuit Judicial Conference. The Committee serves as an

advisory group with respect to procedural and other practice-related issues. For example, during the time that I have served on the Committee we have provided advice with respect to the establishment of a Law Student Practice Rule.

In March of 1993 I was appointed to the Civil Justice Reform Act Committee for the Middle District of Pennsylvania. Our group meets on a periodic basis and has finalized a Civil Justice Reform Act Plan for the Middle District.

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
QUESTIONNAIRE FOR JUDICIAL NOMINEES

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts, and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

Pursuant to a letter agreement dated August 12, 1993, my former law firm, Dilworth, Paxson, Kalish & Kauffman, has agreed to pay me a total of \$5,000 in 1994 in four quarterly installments. This payment, as well as a \$1,500 payment received in October of 1993, is in recognition of the fact that the recent settlement of a contingent fee case resulted in a substantial fee to the Dilworth law firm.

Discussions pertaining to payment of a sum certain in recognition of my contributions to my present firm during 1993 and as compensation for the value of my interest in the firm are presently ongoing. It is hoped that any payments will be completed prior to my departure from the firm. If not, both sides have agreed that any payments will be completed within 3 years of my departure, and no payments will be contingent upon the occurrence of any event or outcome of any litigation.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

In determining those situations that mandate disqualification or require a careful evaluation of the circumstances to determine whether recusal is warranted, I will be guided by the Canons of the Code of Judicial

Conduct of United States Judges, statutes governing disqualification of United States Judges, 28 U.S.C. §§144 and 455, advisory rulings of the Committee on Codes of Conduct of the Judicial Conference of the United States, and applicable case law.

I anticipate that during my initial service in the position to which I have been nominated conflicts of interest will arise if cases in which either the Dilworth law firm or my present law firm are counsel of record for any parties. I will establish a procedure by which I will not be assigned cases in which either of these law firms represent the complaining party for an appropriate period of time after the completion of any financial arrangements involving each of the firms. I will also establish a screening procedure to insure prompt recusal for that period of time once it is determined that either firm is involved in the litigation on behalf of a defendant.

Mandatory, non-waivable disqualification is essential where, inter alia, the judge has "a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings," 28 U.S.C. §455(b)(1); or "[w]here in private practice he served as a lawyer in the matter in controversy or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it." 28 U.S.C. §455(b)(2). A screening procedure will be established to determine whether mandatory non-waivable disqualification grounds exist. If such grounds exist, prompt notification of my recusal will be made to counsel for all parties.

In those instances when litigation is assigned to me that involves parties previously represented by me or my law firm in matters unrelated to the assigned case, the fact of my or my law firm's prior representation of a party to the litigation will be promptly and fully disclosed, and I will recuse myself if any party objects to my continued involvement in the litigation. Even if no party objects, I will recuse myself if I conclude that a reasonable person possessing knowledge of all the circumstances would "harbor doubts about [my] impartiality." Huff v. Standard Life Ins. Co., 683 F.2d 1363, 1369 (11th Cir. 1982).

I also recognize that it is my obligation to inform myself about personal and fiduciary financial interests of not only myself, but also my spouse and minor children, to avoid the appearance of impartiality. See 28

U.S. §455(c). In this regard, there are no "financial arrangements" to which I am presently a party, other than those involving my former and present law firms, that I perceive are likely to present potential conflicts-of-interest during my initial service as a district court judge.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See the attached Financial Disclosure Report, Form AO-10, Rev. 1/93.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

See attached.

6. Have you have held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I have served as Counsel to Governor Robert P. Casey's Campaign Committee since 1986. My responsibilities included communication with the Pennsylvania Bureau of

Elections and rendering advice on the Pennsylvania Campaign Finance Law. I reviewed Campaign Expense and Contribution Reports for compliance with Pennsylvania law.

I previously served on the Finance Committee for Gerald Stanvitch, a candidate for the Mayor of Scranton in 1993.

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
QUESTIONNAIRE FOR JUDICIAL NOMINEES

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I have accepted appointments to represent indigent criminal defendants and indigent federal and state prisoners. The most recent occasion was in 1987 and 1988, when I was appointed by the United States Court of Appeals for the Third Circuit to represent an inmate at the State Correctional Institution in Huntingdon, Pennsylvania, contesting his long term incarceration in "administrative segregation." I devoted more than 100 hours to the pursuit of that appeal.

I accepted an appointment by the Third Circuit to represent an indigent prisoner in appealing from a federal court conviction (United States v. Frankenberry, 696 F.2d 239 (3rd Cir. 1982)), and an appointment by the district court to represent an indigent defendant in a federal court trial. In each instance I devoted substantially more than 100 hours in representing those clients.

I have also accepted other court appointments to represent indigent defendants that did not proceed to trial.

I have served pro bono as counsel to a non-profit corporation providing gymnastics training to hundreds of children in our area. Our representation was instrumental in establishing this non-profit training facility. I have volunteered for the Lackawanna Bar Association pro bono project. I have provided pro bono representation to a number of persons of low or moderate income who were unable to afford legal

representation.

I have served as a volunteer on the United Way Allocations Panel for Lackawanna County.

I have served as a coach in Little League Baseball and youth basketball programs.

I helped establish and served as President of Our Lady of Lourdes Regional High School Alumni Association, which has been instrumental in raising money to fund scholarships for needy students. Since 1990, I have devoted well in excess of 200 hours to the establishment of what is now a very successful alumni organization.

I have volunteered as a speaker at youth programs at my children's grade school and have served as a moderator on class trip programs.

I have devoted more than 50 hours in establishing a successful ongoing CLE program for the Lackawanna Bar Association.

I devoted considerable time in preparing for and delivering presentations on continuing legal education matters to the members of the Lackawanna Bar Association.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

I have never belonged to any organization which discriminates on the basis of race, sex or religion.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination

to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

Senator Harris Wofford established a Merit Selection Committee for the judicial vacancies in the Middle District of Pennsylvania. The Committee was comprised of 11 persons, who came from a variety of backgrounds. I participated in the process established by that Committee, which included completion of a detailed questionnaire (not unlike this questionnaire); an initial interview by a three-person panel of the 11 member Committee; submission of a writing sample; and a second interview conducted by the entire 11-member Committee. The Merit Selection Committee recommended me and 5 other applicants, from more than 60 applicants, to Senator Wofford. Senator Wofford selected me as his recommendation for one of the two judicial vacancies in the Middle District of Pennsylvania

I was evaluated by the American Bar Association Standing Committee on the Federal Judiciary. The evaluation process included completion of a detailed questionnaire; submission of evidence of legal writing ability; interviews of judges and colleagues by a member of the ABA Committee; and an interview of me by that member of the ABA Committee. I have been informed that a substantial majority of the Committee approved a "well-qualified" rating, the strongest affirmative endorsement provided by the Committee, while a minority approved a "qualified" rating.

I have undergone an extensive background investigation by the Federal Bureau of Investigation. The investigation included completion of a detailed questionnaire and interviews of neighbors, friends, professional colleagues, judges, and others.

I have also completed questionnaires of the Department of Justice, and I have participated in extensive interviews with attorneys in the Department of Justice.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any

specific case, legal issue or question in a manner that could reasonably be interpreted as asking you how you would rule on such case, issue, or questions? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of the "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

It is imperative that a district court judge recognize that it is the judiciary's mandate to adjudicate disputes, and not to "solve problems." Disputes must be adjudicated by application of the governing law to the facts presented, not by re-writing the law or by

considering hypothetical facts. Where legislation requires a particular result, the legislation may not be re-written to achieve what an individual judge considers to be a "more appropriate" result.

The judiciary should not employ "the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals." Although a decision in an individual case may have applicability to others, the extent to which that decision is applicable to others must await presentation of appropriate controversies and consideration of particular factual nuances that may distinguish one case from another.

Furthermore, cases should be heard and decided only when brought by those having the requisite stake in the outcome and where there exists the necessary adversity of interests among the litigants. Otherwise, the doctrines of standing and ripeness are perceived as mechanisms by which litigation becomes a vehicle for "problem-solving" as opposed to concrete dispute adjudication.

While the judiciary should refrain from "impos[ing] itself upon other institutions in the manner of an administrator with continuing oversight responsibilities," there are some limited instances when such action is appropriate. As a litigator, I have seen the necessity to establish continuing judicial oversight where resolution of a dispute involves regulation of the conduct of the parties. Continuing oversight responsibilities have long been recognized as appropriate where conduct of private parties or governmental entities imperils the economic or individual rights of affected parties.

In short, I believe it is the mandate of the judiciary to resolve concrete disputes presented by parties having the requisite adversity of interests and stake in the outcome of the litigation. Where necessary, the relief decreed by the judiciary must be adequate to safeguard the rights of the prevailing parties without resulting in excessive judicial entanglement in the other branches of government.

AFFIDAVIT

I THOMAS I. VANASKIE, do swear that
the information provided in this statement is, to the best of my
knowledge, true and accurate.

Nov. 18, 1993

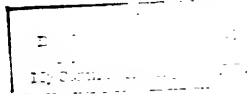
(DATE)

Thomas I. Vanaskie

(NAME)

Denise F. Kester

(NOTARY)



AO-10
Rev. 1/93

FINANCIAL DISCLOSURE REPORT

Report Required by the Ethics
Reform Act of 1989, Pub. L. No. 101-194,
November 10, 1989
(5 U.S.C.A. App. 6, §§101-112)

1. Person Reporting (Last name, first, middle initial) Vanaskie, Thomas I.	2. Court or Organization -	3. Date of Report 11/18/93
4. Title (Article III Judges indicate active or senior status; Magistrate Judges indicate full- or part-time) -	5. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date 11/17/93 - Initial - Annual - Final	6. Reporting Period 1/1/92 to 10/31/93
7. Chambers or Office Address 127 N. Washington Ave. 600 Penn Security Bank Bldg. Scranton, PA 18503	8. On the basis of the information contained in this Report, it is, in my opinion, in compliance with applicable laws and regulations Reviewing Officer Signature _____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on last page.

I. POSITIONS. (Reporting individual only; see pp. 7-8 of Instructions.)

POSITION

NAME OF ORGANIZATION/ENTITY

☐

NONE (No reportable positions)

1/1/91-3/20/92 Partner Dilworth, Paxson, Kalish & Kauffman

3/21/92-Present Director Elliott, Vanaskie & Riley

5/91-Present Director Our Lady of Lourdes Regional High School Alumni Assoc.

II. AGREEMENTS. (Reporting individual only; see p. 8-9 of Instructions.)

DATE

PARTIES AND TERMS

☐

NONE (No reportable agreements)

A.) 8/12/93 Agreement with Dilworth, Paxson, Kalish & Kauffman requiring payment to me of \$5,000 in 4 quarterly installments during 1994.

B.) Participant in Dilworth, Paxson, Kalish & Kauffman Retirement Plan

III. NON-INVESTMENT INCOME. (Report for individual and spouse; see pp. 9-12 of instructions.)

DATE

SOURCE AND TYPE

GROSS INCOME
(Spouse's)

(Honorary only)

☐

NONE (No reportable non-investment income)

1/1/92-3/20/92 Dilworth, Paxson, Kalish & Kauffman (Partnership Income) \$43,107

3/21/92-12/31/92 Elliott, North, Siedzikowski & Vanaskie, P.C. (Salary) \$122,455

1/1/93-10/31/93 Elliott, North, Siedzikowski & Vanaskie, P.C. (Salary) \$115,400

10/93 Dilworth, Paxson, Kalish & Kauffman (contract payment) \$1,500

\$

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting	Date of Report
Vanaskie, Thomas I.	11/18/93

IV. REIMBURSEMENTS and GIFTS - transportation, lodging, food, entertainment, ...

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp.13-15 of Instructions.)

SOURCE	DESCRIPTION
<input checked="" type="checkbox"/> NONE (No such reportable reimbursements or gifts)	
1 EXEMPTED	
2	
3	
4	
5	
6	
7	
8	

V. OTHER GIFTS.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp.15-16 of Instructions.)

SOURCE	DESCRIPTION	VALUE
<input checked="" type="checkbox"/> NONE (No such reportable gifts)		
1 EXEMPTED		\$
2		\$
3		\$
4		\$

VI. LIABILITIES.

(Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp.16-18 of Instructions.)

CREDITOR	DESCRIPTION	VALUE	CODE*
<input type="checkbox"/> NONE (No reportable liabilities)			
1 2/92 Loan from my retirement account under the Dilworth, Paxson, Kalish & Kauffman Retirement Plan.		J	
2			
3			
4			
5			
6			
7			

* VALUE CODES: J = \$15,000 or less K = \$15,001 to \$50,000 L = \$50,001 to \$100,000 M = \$100,001 to \$500,000
 N = \$250,001 to \$500,000 O = \$500,001 to \$1,000,000 P = More than \$1,000,000

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

Vanaskie, Thomas J.

Date of Report

11/18/93

VII. INVESTMENTS AND TRUSTS - income, value, transactions. (Includes those of spouse and dependent children; see pp. 18-27 of Instructions.)

A. Description of Assets (Including trust assets) Indicate, where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for own ship by dependent child. Place "N/A" after each asset exempt from prior disclosure.		B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
(1) Asset Code (A-B)	(2) Type (a-g, div., inst or lat.)	(1) Value Code (J-P)	(2) Value Method Code (Q-V)	(1) Type (b, s, buy, sell, margin, redemption)	If not exempt from disclosure				(5) Identity of buyer/seller (if private transaction)	
				(2) Date: Month Day	(3) Value Code (J-P)	(4) Gain Code (A-B)				
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)										
1	1/1/92 - 12/31/92 -	C	Div.	L	T	E X E M P T				Exempt
2	Dilworth, Paxson,									
3	Kalish & Kauffman									
4	Retirement Account									
5										
6	1/1/93 - 10/31/93	C	Div.	L	T	E X E M P T				Exempt
7	Dilworth, Paxson,									
8	Kalish & Kauffman									
9	Retirement Account									
10										
11	1/1/92 - 12/31/92	A	Int.	J	T	E X E M P T				Exempt
12	Penn Security Bank &									
13	Trust Co., Accounts									
14	5244-732-1 and									
15	58700									
16										
17	1/1/93 - 10/31/93	A	Int.	J	T	E X E M P T				Exempt
18	Penn Security Bank &									
19	Trust Co., Accounts									
20	5244-732-1									
1 Income/Gain Codes: A=\$1,000 or less B=\$1,001 to \$2,500 C=\$2,501 to 5,000 D=\$5,001 to 10,000 (See Col. B' & 04) E=\$15,001 to \$30,000 F=\$30,001 to \$100,000 G=\$100,001 to \$1,000,000 H=more than \$1,000,000 2 Value Codes: J=\$15,000 or less K=\$15,001 to \$30,000 L=\$30,001 to \$100,000 M=\$100,001 to \$1,000,000 N=\$1,000,001 to \$10,000,000 O=\$10,000,001 to \$1,000,000,000 P=more than \$1,000,000,000 (See Col. C1 & 03) W=\$250,001 to \$500,000 X=\$500,001 to \$1,000,000 Y=\$1,000,001 to \$5,000,000 Z=\$5,000,001 to \$10,000,000 3 Value Method Codes: Q=Appraisal R=Cost (real estate only) S=Assessment T=Cash/Market U=Book Value V=Other W=Estimated										

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

Vanaskie, Thomas I.

Date of Report

11/18/93

VIII. ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate part of Report.)

VII. Investments in my retirement account are self-directed, but are not owned individually by me or my spouse. An account statement for the month ending September 30, 1993, the most current statement in my possession, is attached hereto as Exhibit "A". The account statement identifies the investments in my retirement account as of 10/31/93.

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. App. 7, § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature

Date

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILLFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C.A. APP. 6, § 104, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Judicial Ethics Committee
Administrative Office of the
United States Courts
Washington, DC 20544

Client Statement

Securities Account

Prudential Securities
Prudential Securities Incorporated, a subsidiary of
The Prudential Insurance Company of America, Newark, New Jersey

Page 1 of 2

Account Number:

For the Period: Sep 1 - Sep 30, 1993

	OPENING	CLOSING
Net Worth		
PRICED SECURITIES VALUE	467,124.37	467,245.05
MONEY MARKET FUNDS	61,445.00	61,445.00
CASH BALANCE	910.09	910.09
DIRECT INVESTMENTS		683.13
(See Direct Investments section for details)		
TOTAL NET WORTH	469,579.46	469,793.18

	THIS PERIOD	YEAR TO DATE
Income & Distributions		
MONEY FUND DIVIDENDS	63.00	613.00
DIVIDENDS	448.15	4279.23
TOTAL INCOME	511.15	4892.23

Your Financial Advisor
ALAN H. MYERS, CFP
VICE PRESIDENT INVESTMENTS
1515 MARKET STREET
SUITE 300
PHILADELPHIA, PA 19102
215-241-8753

Your Federal ID Number: F50-2048893

PRUDENTIAL BANK AND TRUST TTEE
DILWORTH PAXSON REIT FUND
FIDELITY INVESTMENT ADVISORS
2000 MARKET STREET
CLARK'S GREEN PA 18433-8957

PRICE/ENTRY AMOUNT CHARGED AMOUNT CREDITED
073.04

Money Fund
Income

DATE	TRANSACTION	QUANTITY	DESCRIPTION	PER LTR OF AUTH FM	UNIT-89480-1
09/02	Credit				
09/27	Dividend	3	PRU MONEYMART DIV REINV	08/26 - 09/26	
09/29	Dividend	6.559	PRU UTILITY FID B DIV REINV		
			VALUE 448.15	REINV AT \$10.39	

Account
Activity

DESCRIPTION	QUANTITY	PRICE	ESTIMATED ANNUAL INCOME	COMMENTS
AIM EQUITY FUNDS WEINGARTEN FUND	445.412	17.510	912,001.56	
DISNEY MALT CO	150	37.75000	65,442.50	
G.T. GLOBAL GROWTH FUNDS	806	13.340	410,768.16	
PACIFIC GROWTH FUNDS CLASS A				
PRUDENTIAL UTILITY FUND-CLASS B	1,245.709	10.480	915,055.03	
PRUDENTIAL EQUITY FUND-CLASS B	841.247	13.930	911,997.17	

Portfolio
Summary

Client Statement

Securities Account

Prudential Securities
 Prudential Securities Incorporated, a subsidiary of
 The Prudential Insurance Company of America, Newark, New Jersey, NJ

Page 2 of 2

PRUDENTIAL BANK AND TRUST TITLE Sep 1 - Sep 30, 1993 Account Number:

Portfolio Summary

DESCRIPTION	QUANTITY	PRICE	VALUE	ESTIMATED ANNUAL INCOME	COMMENTS
CERTIFICATES ACCRUAL TREASURY SER H PRIN PMT ON 11.075% 2003 RS 0.000 11/15/2003	25,000	55.122	\$13,780.63		
PRICED SECURITIES VALUE			\$67,265.05	\$37.50	
PRUDENTIAL MONEYMARK ASSETS FUND	1,445	1.000	\$1,445.00	\$36.99	2.56 % YIELD
MONEY MARKET FUNDS			\$1,445.00	\$36.99	

Investment

DESCRIPTION	QUANTITY	PRICE	FACE AMOUNT	COMMENTS
SUMMIT INSURED EQUITY LP	140	25.000	\$4,000.00	
FIDELITY SECURED EQUITY LP 1	200	20.000	\$4,000.00	
TOTAL DIRECT INVESTMENTS			\$8,000.00	

We have provided the above details about direct investments for informational purposes only. It reflects purchases through Prudential Securities or information supplied to us. Positions designated by a are not held in your account at Prudential Securities. We have not confirmed that you continue to own this security with the issuer. Face amounts do not represent current market value.

ARE YOU AWARE OF THE MANY BENEFITS YOU COULD BE ENJOYING WITH A COMMAND ACCOUNT? YOUR FINANCIAL ADVISOR CAN SEND YOU A BROCHURE THAT SUMMARIZES THE FEATURES OF THIS PREMIER INVESTMENT ACCOUNT. YOU OWE IT TO YOURSELF TO EXPLORE WHAT COMMAND CAN DO FOR YOU.

NET WORTH

Provide a complete, current financial net worth statement which itemizes **known** assets (including accounts, real estate, securities, trusts, investments, and other financial holdings) and liabilities (including mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	\$ 10,000.00	Notes payable to banks—secured	25,000.00
U.S. Government securities—add schedule	0.00	Notes payable to banks—unsecured	1,300.00
United securities—add schedule	0.00	Notes payable to relatives	0.00
Unlisted securities—add schedule	0.00	Notes payable to others	4,000.00
Accounts and notes receivable:		Accounts and bills due	8,700.00
Due from relatives and friends	0.00	Unpaid income tax	0.00
Due from others	5,000.00	Other unpaid tax and interest	0.00
Doubtful	0.00	Real estate mortgages payable—add schedule	178,000.00
Real estate owned—add schedule	250,000.00	Chattel mortgages and other loans payable	15,000.00
Real estate mortgages receivable	0.00	Other debts—Name:	
Autos and other personal property	50,000.00	Dr. Quigg - Orthodontist	1,500.00
Cash value—life insurance	0.00	American General Finance	1,500.00
Other assets—Name: IRA's	5,000.00	Retirement Account Loan	15,000.00
Retirement Account (Statement attached)	75,000.00		
Note payable to Retirement Account	15,000.00	Total Liabilities	250,000.00
Total assets	410,000.00	Net worth	160,000.00
		Total Liabilities and net worth	410,000.00
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, cosigner or guarantor	0	Are any assets pledged? (Add schedule.)	No
On leases or contracts	0	Are you defendant in any suits or legal actions?	No
Legal Claims	0	Have you ever been bankrupt?	No
Provision for Federal Income Tax	0		
Other special debt	0		

SCHEDULE TO NET WORTH STATEMENT.

Real estate owned is limited to our personal residence located at 102 Possum Way, Clarks Green, Pennsylvania.

The real estate mortgage payable is secured by our residence and is payable to Greentree Mortgage Company, 17000 Thomas Parkway, Mount Laurel, New Jersey.

The secured note is payable to Mellon Bank, N.A., Scranton, Pennsylvania.

The note payable to banks-unsecured, is payable to PNC Bank, Scranton, Pennsylvania.

The notes payable to others is payable to William Eynon, Dunmore, Pennsylvania.

Accounts and bills due are as follows:

Primerica Mastercard	-	\$ 4,900.00
Citibank VISA	-	3,100.00
Sears	-	500.00
Bon-Ton	-	100.00
J.C. Penney	-	100.00

The chattel mortgage is the note secured by an automobile and payable to PNC Bank of Scranton, Pennsylvania.

UNITED STATES SENATE QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

Helen Georgena Roberts Berrigan (nickname: Ginger)

2. Address: Place of residence and office:

Home: 4319 Hamilton Street, New Orleans, La. 70118
Office: Suite 2150 Energy Centre, 1100 Poydras Street,
New Orleans, Louisiana, 70163-2150

3. Date and place of birth:

April 15, 1948, New Rochelle, New York

- 4.
- Marital Status
- : (include maiden name and husband's name. List spouse's occupation, employer's name and business address)

Married: Joseph E. Berrigan, Jr. My husband is an attorney and the senior partner of the law firm of Berrigan, Litchfield, Schonekas, Mann & Clement, Suite 2150 Energy Centre, 1100 Poydras Street, New Orleans, La. 70163-2150.

- 5.
- Education
- : List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

University of Wisconsin, 1965-69, B.A. 1969 in Psychology;

American University, Washington, D.C., 1970-71, M.A.
1971 in Communications;

Louisiana State University, 1974-77, J.D. 1977 in Law.

- 6.
- Employment Record
- : List (by year) all business or professional corporations, companies, firms or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

1978-present - Associate attorney, law firm of Gravel Brady & Berrigan, New Orleans, Louisiana;

1990-1993 - Contract attorney with the Jefferson Parish Indigent Defender Board, Gretna, Louisiana;

6. Employment Record:

1984-present - Of counsel to the law firm of Berrigan, Litchfield, Schonekas, Mann & Clement, New Orleans, Louisiana;

1977-1978 - Staff attorney, Governor's Pardon, Parole and Rehabilitation Commission, Baton Rouge, Louisiana;

1975-1977 - Law clerk, Louisiana Department of Corrections;

1973-1974 - Assistant to Charles Evers, civil rights leader and Mayor of Fayette, Mississippi;

1972-1973 - Legislative aide (part-time, unpaid), Senator Joseph E. Biden, D-Delaware, United States Senate, Washington D.C.;

1971-1972 - Staff researcher (part-time, unpaid), Senator Harold E. Hughes, D-Iowa, United States Senate, Washington D.C.;

1971 - Graduate assistant, Department of Communications, American University, Washington, D.C.;

1970 - Administrative secretary, Boston College, Chestnut Hill, Massachusetts;

1969 - Staff Assistant, University of Wisconsin Extension Madison, Wisconsin.

7. Military Service: Have you had any military service? No.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

None.

9. Bar Associations: List all bar associations, legal or judicial related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

1977-present - Louisiana State Bar Association; 1983, Chairman of the Criminal Law Section.

1986-present - Bar Association, Federal Fifth Circuit.

9. Bar Associations:

1985-present - Louisiana Association of Criminal Defense Lawyers; 1988-1993, Board of Directors; 1990, Defense Attorneys Assistance Committee.

1987-present - Louisiana Sentencing Commission, Member (appointed by Governor).

1988-1990 - New Orleans Association for Women Attorneys; Board Member, 1988-1989; Program Chairman, 1988-1989.

1986-1988 - Louisiana Capital Defense Project, President.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

1989-present - Committee of 21, President of the Board, 1990-92;

1989-present - American Civil Liberties Union of Louisiana, President, 1989-1993; Vice-President, 1993-present;

1990-present - Forum for Equality, Member of the Steering Committee, 1991-present; Chairman-Elect, 1992-1993; Chairman, 1993-present;

1990-present - Amistad Research Center, Tulane University, Member of the Board.

11. Court Admission:

List all courts in which you have been admitted to practice, with dates of admission and lapses if any such membership lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

<u>Court</u>	<u>Date of Admission</u>
1. Louisiana Supreme Court	10/05/77

11. Court Admission:

- | | | |
|----|---|----------|
| 2. | United States District Court
Western District of Louisiana | 10/15/79 |
| 3. | United States District Court
Middle District of Louisiana | 11/26/79 |
| 4. | United States District Court
Eastern District of Louisiana | 1/26/83 |
| 5. | United States Court of Appeals
Fifth Circuit | 10/01/81 |
| 6. | United States Army Court of
Military Review | 10/06/81 |
| 7. | United States Court of
Military Appeals | 7/31/80 |

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Louisiana Criminal Trial Practice, 2nd Edition, Harrison Publishing Company, Norcross, Georgia, 1992;

Louisiana Criminal Trial Practice Formulary, co-compiled with Julian R. Murray, Jr., Harrison Publishing Company, Norcross, Georgia, 1990;

Louisiana Criminal Trial Practice, co-author with Julian R. Murray, Jr., Harrison Publishing Company, Norcross, Georgia, 1984;

"The Purpose of Punishment", Blueprint for Social Justice, Loyola University Institute for Human Relations, 1987;

"Edward Livingston and American Penology" 37 Louisiana Law Review 1037 (1977).

I have frequently been a speaker in continuing legal education seminars sponsored by the Louisiana State

University Law Center, Tulane University Law School, Loyola University Law School, the Louisiana Judicial College, the Louisiana State Bar Association and the Louisiana Association for Criminal Defense Lawyers. In connection with my civic and community activity, I have been a speaker for several groups such as the Junior League of New Orleans and the YWCA, and have also appeared on various programs on public television.

13. Health: What is the present state of your health? List the date of your last physical examination.

My health is good. My last general exam: April, 1993.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I have not previously held judicial office.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Not applicable.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

In 1987, I was appointed by the Governor of Louisiana to serve on the Louisiana Sentencing Commission. The commission was created by the Louisiana Legislature to promulgate sentencing guidelines in felony cases. I still serve on that Commission, having been reappointed twice by successive governors, Republican and Democrat. I have never been a candidate for elective office.

17. Legal Career:

A. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge:

I have not served as a clerk to a judge.

2. whether you practiced alone:

I have not practiced alone.

3. The dates, names, addresses of law firms or offices, companies or governmental agencies with which you have been connected and the nature of your connection with each;

After graduating from law school in May, 1977, I worked for a year as a Staff Attorney for the Governor's Pardon, Parole and Rehabilitation Commission. This Commission was created to study the state corrections system and make legislative and administrative recommendations for improvement. The Commission no longer exists.

In October, 1978, I joined the law firm of Gravel, Roy & Burnes as an associate attorney. I have remained with that law firm to the present time. The partnership and title of the firm have changed several times and is most recently Gravel, Brady & Berrigan.

There is a New Orleans branch where I am the sole attorney. The address is Suite 2150, Energy Centre, 1100 Poydras Street, New Orleans, Louisiana 70163-2150.

Since approximately 1985, I have been "of counsel" to the law firm of Berrigan, Litchfield, Schonekas, Mann & Clement, Suite 2150, 1100 Poydras Street, New Orleans, La.

In January, 1991, I contracted with the Jefferson Parish Indigent Defender Board to handle appeals of indigent criminal defendants. This contract expired in June, 1993. The address is 217 Derbigny Street, Gretna, Louisiana 70053.

- B. 1. What has been the general character of your law practice, dividing it into periods with dates:

The general character of my practice is and has been criminal defense. This includes pretrial and trial proceedings, federal and state, misdemeanor and felony. It also includes post-trial work, criminal appeals, post-conviction writs, and administrative matters such as pardon, parole, prison transfers, and professional licensing as it is affected by criminal conviction. I have handled approximately 550 cases in my career.

- B. 2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

My "typical" client is a person who is criminally accused or convicted, is indigent or borderline indigent, usually with poor educational and work skills and frequently of a minority group. However, I have also handled so-called white collar cases which involved businessmen who are well-educated, skilled and until that point reasonably successful.

As indicated above, my area of specialty is criminal defense.

- C. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I appear in court on a regular basis. This includes pretrial proceedings, trial work and post-conviction court appearances. I also appear before administrative bodies such as the Pardon Board, Parole Board or licensing boards.

2. What percentage of these appearances was in:

1. Federal courts: approximately 20% ;
2. State courts of record: approximately 80% ;
3. Other courts: Minimal.

C. 3. What percentage of your litigation was:

1. Civil; 2. Criminal;

Virtually all of my practice has been in criminal law. Some aspects of that litigation however use civil rather than criminal procedural rules; such as habeas corpus and administrative proceedings such as pardon, parole and professional licensing. Early in my career, I handled a number of civil cases which were relatively simple - uncontested divorces, separations, curatorships. On two occasions, I did handle contested personal injury suits and on one occasion, contested anti-trust litigation.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I have been involved in 33 cases that were tried to verdict. I was sole counsel in 11 of them; chief counsel in 6 more and associate counsel in the remaining 16.

5. What percentage of these trials was:

- a) jury; b) non-jury;

31 of the 33 were jury trials.

18. Litigation:

Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- a. the date of representation;
- b. the name of the court and the name of the judge or judges before whom the case was litigated; and,
- c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

18. Litigation:

1. United States v. Otto Passman, 78-CR-30013, United States District Court, Western District of Louisiana, Monroe Division

Congressman Otto Passman was indicted on charges of accepting illegal gratuities from Korean businessman/lobbyist Tongsun Park in connection with Korean purchases of Louisiana rice. He was also charged with income tax evasion. The charges were brought in Washington D.C. by the Public Integrity Section of the United States Department of Justice. The case was subsequently transferred to Louisiana for trial.

Our law firm represented Passman. I joined the firm a few months prior to trial and was immediately assigned to work on the case. I prepared extensive and detailed pretrial motions and also researched a great deal on Louisiana's rice industry, the structure and functioning of the Korean government and the history of trade between Louisiana and Korea. The trial itself lasted seven weeks. I prepared witness packets for use in direct and cross-examination and researched and drafted memorandums on legal issues that arose during trial. I also drafted the opening and closing arguments. Passman was acquitted of all charges.

My senior partner, Camille Gravel, Jr. was Passman's attorney. His address is 711 Washington Street, Alexandria, Louisiana 71309; Phone (318) 487-4501. Lead counsel for the Department of Justice was David Scott. There were also a Mr. Silverstein and a Mr. Cannon assisting him. All were with the Public Integrity Section of the Department of Justice; (202) 514-1412. The trial judge was Hon. Earl Veron, now deceased.

2. Schwegmann v. Edwards, et al, No. 223598, "F", 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana

Schwegmann Giant Super Markets, a New Orleans grocery store chain, sued the Governor and other Louisiana public officials to have the state's "Beer Cash Law" declared unconstitutional. The law, La.R.S. 26:741, prohibits the extension of credit to beer retailers by wholesalers for purchases of beer. Schwegmann claimed the statute violated due process, equal protection, the freedom to contract, separation of powers and other provisions of the United States and Louisiana Constitutions.

2. Schwegmann v. Edwards, et al, No. 223598, "F", 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana

I was appointed by the state Attorney General as a special assistant attorney general to help defend against the suit. The suit was filed in early 1978, shortly after I began practicing law. I did extensive research into the history of the law which related back to monopolistic trade practices whereby beer wholesalers gained control of retail outlets (bars, lounges, restaurants) through manipulation and control of credit. I also did in-depth research into marketing and marketing techniques, competitive and anti-competitive practices, and the financial structure and nature of the liquor industry generally and the beer industry in particular. With respect to the law, I also did thorough research into anti-trust law, regulation of the liquor industry, the police power, as well as more generic principles of constitutional and statutory law.

I handled much of the pretrial pleadings and some of the depositions. At a later date, the case went to trial and the trial was handled by other attorneys. The trial court found the statute constitutional, as did the state court of appeals. The Louisiana Supreme Court declined to hear the case so the lower court judgment stood. The trial judge was Hon. Doug Moreau, 19th Judicial District Court. The opposing counsel were Michael Fontham and Richard Stanley, with Stone, Pigman, Walther, Wittmann & Hutchinson, 546 Carondelet Street, New Orleans, La. 70130; phone (504) 581-3200. The state was represented at trial and subsequently by David Stewart, Ropes and Gray, 1001 Pennsylvania Avenue N.W., Suite 1200-South, Washington D.C. 20004; phone (202) 626-3900.

3. State of Louisiana v. Joey McDaniel, 410 So.2d 754 (La. 1982).

This was my first jury trial as sole counsel. My client JOEY McDANIEL was charged in Grant Parish, 35th Judicial District Court, and in Rapides Parish, 9th Judicial District Court. The charges in Rapides parish were resolved by a guilty plea to a less serious offense.

We went to trial on the charge in Grant Parish. I objected to the jury instruction regarding the definition of "reasonable doubt". This instruction had been commonly used for years throughout the state. The judge overruled my objection and the instruction was given.

3. State of Louisiana v. Joey McDaniel, 410 So.2d 754 (La. 1982).

My client was convicted as charged. I raised that issue on appeal and the conviction was reversed on that basis. It was the first time apparently that this particular jury instruction had been challenged.

McDaniel became a frequently cited case in subsequent challenges to other similarly worded jury instructions. While those instructions were usually upheld and McDaniel distinguished, the United States Supreme Court finally struck them down in Cage v. Louisiana, 111 S.Ct. 328 (1990).

The case was tried from February 23, 1981 through February 26, 1981. The judge at the trial was the Hon. W.T. McCain who is now deceased. The prosecuting attorney was Gregory N. Wampler who, unfortunately, is currently in federal prison. His address is #07929-035, FPC-El Paso, Post Office Box 16300, El Paso, Texas 79906.

4. United States v. Edwin W. Edwards, Crim. No. 85-078, Section E (4), United States District Court, Eastern District of Louisiana.

Governor Edwin W. Edwards was indicted along with several others in the mid 1980's for alleged fraudulent conduct in connection with the awarding of so-called "certificates of need" for construction of privately owned, for-profit medical facilities.

Our firm was retained by Governor Edwards as co-counsel in his representation. My role was to research and prepare pretrial pleadings and memoranda, analyze and outline pretrial recorded statements by the witnesses, and prepare direct and cross-examination packets. I also researched and prepared memoranda on issues that arose during the trial.

The first trial ended in partial acquittals for some defendants but was deadlocked 11-1 for acquittal as to the Governor and others. A mistrial was declared. My role in the second trial was essentially the same as in the first. This time the Governor and the others were acquitted of all charges.

The first trial began on September 17, 1985 and ended in mistrial on December 18, 1985. The second trial began on March 24, 1986, and ended May 12, 1986.

4. United States v. Edwin W. Edwards, Crim. No. 85-078, Section E (4), United States District Court, Eastern District of Louisiana.

The prosecuting attorneys were then United States Attorney John Volz, and Assistant United States Attorney Robert Boitmann, United States Attorney's Office, 501 Magazine Street, 2nd Floor, New Orleans, Louisiana 70130; telephone (504) 589-2929, and Pauline F. Hardin, now in private practice at Jones, Walker Law Firm, 201 St. Charles Avenue, New Orleans, Louisiana 70170; telephone (504) 582-8110. The co-counsel in both trials was Camille F. Gravel, Jr., 711 Washington Street, Alexandria, La. 71309, telephone (318) 487-4501.

Chief counsel in the first trial was James Neal, Neal & Harwell, Suite 2000, First Union Tower, 150 4th Avenue North, Nashville, Tennessee 37219; telephone (615) 244-1713. Chief counsel in the second trial was Michael S. Fawer, 2311 Cedar Springs, Suite 250, Dallas, Texas 75201; telephone (214) 953-1000. The judge in both trials was Hon. Marcel Livaudais, Jr.

5. State v. Bedford Doyle Ruff, 504 So.2d 72 (La. App. 2nd Cir. 1987)

Our client was BEDFORD DOYLE RUFF who was charged with second degree murder. Our defense was justifiable homicide.

My senior partner, Camille Gravel, Jr., and I were co-counsel. I handled the pretrial investigation which involved lengthy interviews with numerous people familiar with the individuals involved, their relationships, as well as witnesses who were at or nearby when the incident took place.

We waived a jury and elected to be tried by the judge. My senior partner and I shared the examination of witnesses. The trial judge found RUFF guilty as charged of second degree murder and sentenced him to mandatory life imprisonment.

I handled the appeal and raised three issues. One was that RUFF should be acquitted because we had established justifiable homicide. My second issue was that RUFF should be acquitted of murder because the mitigating factors of the lesser crime of manslaughter were present. My third issue was that we were entitled to a new trial

5. State v. Bedford Doyle Ruff, 504 So.2d 72
(La. App. 2nd Cir. 1987)

because the state had withheld exculpatory evidence contained in civil depositions with respect to the latter two issues, (assuming our claim of justifiable homicide was rejected). The appellate court acquitted RUFF of murder on the basis that the mitigating facts of manslaughter had been proved, then remanded the case for a new trial on the withholding of the exculpatory evidence.

The case was tried from March 3, 1986 through March 7, 1986. The prosecutor was and still is the District Attorney, William Coenen, 108 Courthouse Square, Rayville, La. 71269, telephone (318) 728-3227. The trial judge was Hon. Glen W. Strong. My senior partner, Camille Gravel, Jr. is at 711 Washington Street, Alexandria, La. 71309, Phone (318) 487-4501.

6. State of Louisiana v. Peter Hawist, #36,835
11th Judicial District Court, Parish of Sabine.

Our client, PETER HAWIST, was a soldier charged with first degree murder, carrying a possible death penalty if convicted. My senior partner, Camille Gravel, Jr. was lead counsel. I handled the majority of pretrial preparation with a young associate in the firm, Charles G. Gravel.

During the trial itself, my senior partner and I shared the examination of witnesses and I also provided material to my partner for his examinations. The case was prosecuted by the District Attorney himself, Don Burkett.

Prior to trial, the District Attorney was adamant about trying the case as first degree murder with exposure to the death penalty. Our defense was justifiable homicide. Towards the end of our presentation of the defense, the District Attorney disclosed to us that we had created a reasonable doubt in his mind and he could not in good conscience proceed with the prosecution. He then excused the jury and dismissed all charges against our client.

The case was tried from March 28, 1988 until March 31, 1988 when charges were dismissed. The District Attorney was and still is Don Burkett whose address is Post Office Box 1557, Many, Louisiana, 71449. His telephone number is (318) 256-6246. The judge was the Hon. John Pickett, Jr. The address for my partner, Camille Gravel, is 711 Washington Street, Alexandria, La. 71309, (318) 487-501.

7. State ex rel Lawrence v. Smith, 571 So.2d 133 (La. 1990)

In 1978 DAVID LAWRENCE was convicted of second degree murder. His conviction and sentence were affirmed on appeal. I was not involved in any way in his initial trial or appeal.

I was retained by LAWRENCE approximately ten years later to determine if he had any grounds to challenge his conviction. After a review of the evidence, I concluded LAWRENCE had been wrongfully convicted of murder when in fact the lesser crime of manslaughter had been committed.

I filed an application for post-conviction relief on the above grounds. It was denied by the trial judge. I then applied for a supervisory writ to the Louisiana Supreme Court which was granted. After briefing and argument, the court ruled 6-1 that LAWRENCE be acquitted of murder and convicted instead of manslaughter.

The case was remanded for re-sentencing. LAWRENCE was re-sentenced to 21 years imprisonment.

The prosecutor in the post-conviction proceedings was Asa Skinner, Assistant District Attorney, Vernon Parish Courthouse, Leesville, Louisiana 71446; telephone (318) 239-2008. The trial level judge was the Hon. Roy B. Tuck, Jr.

8. State of Louisiana v. Roy Bennett, 610 So.2d 120 (La. 1992)

Roy Bennett was convicted of a crime. That conviction was overturned by the Court of Appeals, rehearing was denied, and the State's timely application to the Louisiana Supreme Court was rejected. Bennett was set for retrial over a year after the Court of Appeals denied rehearing. The defendant contended however that the one year statute of limitations had run and he could not be retried. The trial court denied the motion, trial proceeded and Bennett was again convicted. On appeal, the appellate court reversed the conviction, agreeing with the defendant that prescription had run. Rehearing by the State was denied.

I was contacted then by the District Attorney's Office and retained to prepare an application for a supervisory writ on behalf of the prosecution to the Louisiana Supreme Court.

8. State of Louisiana v. Roy Bennett, 610 So.2d 120 (La. 1992)

In Louisiana, the State has one year from the grant of a new trial to then commence that trial. The issue was when that one year period began, whether it began with the reversal on appeal, or upon the denial of rehearing, or upon the denial of the application for supervisory writs.

The issue involved detailed research into the constitutional and legislative history of criminal appellate jurisdiction and procedure in Louisiana, and a comparative analysis with civil appellate procedure. I used the legislative and constitutional history of criminal appellate jurisdiction to argue that the legislature intended the rules of prescription to be the same for criminal and civil jurisdiction and that the failure to expressly say so statutorily was a legislative oversight.

The Louisiana Supreme Court accepted the case, reversed the Court of Appeal, and held that the statute of limitation in criminal cases commenced with the denial of any application for supervisory review.

The District Attorney was and is William Tilley, the Assistant District Attorney is Asa Skinner, Vernon Parish Courthouse, Leesville, Louisiana 71446; (318) 239-2008. Defense counsel was Richard Burnes, 711 Washington Street, Alexandria, Louisiana 71301; (318) 445-0462.

9. State of Louisiana v. Michael Wilson, No. 91-4535
24th Judicial District Court, Parish of Jefferson

Michael Wilson is an indigent indicted for first degree murder in Jefferson Parish. Attorney MARK NOLTING from the Jefferson Parish Indigent Defender Board was appointed to represent him. Over the subsequent months, NOLTING met frequently with Wilson and filed numerous pretrial motions.

Ten months after NOLTING was appointed, the trial judge summarily dismissed NOLTING as Wilson's attorney, and appointed another lawyer outside of the Indigent Defender Board. No reasons were given. NOLTING and Wilson objected to the dismissal.

As an appellate attorney on contract with the Jefferson Parish Indigent Defender Board, I filed an Application for Writ of Certiorari with the Fifth Circuit Court of Appeal (No. 92-K-614). I argued that the dismissal of

9. State of Louisiana v. Michael Wilson, No. 91-4535
24th Judicial District Court, Parish of Jefferson

NOLTING breached Wilson's right to counsel, and set a dangerous precedent in undermining the independence of appointed counsel. I cited American Bar Association standards, United States Supreme Court jurisprudence and detailed case law from other states where other trial courts had tried to likewise "fire" public defenders with whom they were displeased.

The appellate granted the writ, reversed the trial judge and reinstated NOLTING as Wilson's attorney.

The attorney who had been appointed by the trial judge to replace NOLTING then filed an Application for Writ of Certiorari with the Louisiana Supreme Court (No. 92-KK-2434). The District Attorney's office then joined in the Application for Writ. The Supreme Court summarily granted the writ, set aside the ruling of the appellate court and reinstated the trial court's dismissal of NOLTING as Wilson's attorney. I immediately filed an Application for Rehearing, presenting essentially the same factual analysis and legal argument that I had presented to the appellate court. The rehearing was granted and by a 6-1 decision the Court reversed itself and reinstated the ruling of the 5th Circuit upholding NOLTING's continued representation of Michael Wilson.

The prosecuting attorney was Dorothy A. Pendergast, Assistant District Attorney, 5th floor, Courthouse Annex, Gretna, La. 70053; phone (504) 368-1020. The attorney whom the trial judge tried to appoint to replace NOLTING was Camilo K. Salas, III, 201 St. Charles Avenue, Suite 3500, New Orleans, La. 70170; (504) 582-1500. The trial judge was the Hon. Ernest V. Richards, IV.

10. State ex rel Mims v. Butler, 601 So.2d 649 (La. 1992)

Ira Joe Mims was convicted on the same day in 1978 of two felonies based on separate incidents. In 1985, he was convicted of another felony and was then adjudicated a third time felony offender and sentenced to an enhanced punishment under Louisiana's habitual Offender Law. On post-conviction, Mims contended that under Louisiana's Law, a person's offender status is enhanced only if each offense in sequence occurred after conviction for the earlier offense. The trial court had allowed the third offender adjudication even though Mims' second felony offense occurred before he was convicted of the first.

10. State ex rel Mims v. Butler, 601 So.2d 649 (La. 1992)

The appellate court affirmed and so did the Louisiana Supreme Court on initial hearing.

On rehearing, a number of other entities became involved as Amicus Curiae, including the 24th Judicial District Indigent Defender Board which I represented. The case required an analysis of the history of Louisiana's Habitual Offender Law including its various statutory amendments and their interplay with the jurisprudence interpreting the statutes. The goal was to determine legislative intent in light of the ambiguous language of the statute itself and the statutory and jurisprudential history.

Rehearing was granted and the lower court's decisions were reversed. The court found that the statute did require the sequential offense-conviction-offense before a person could be adjudicated an habitual offender.

Elizabeth Cole and Terry Albritton of the Tulane Law Clinic, Tulane University, New Orleans, Louisiana 70118, Telephone number (504) 865-5153, represented Mims. The state was represented by Catherine Estopinal, Assistant District Attorney, First Judicial District Court, Shreveport, Louisiana 71101, Telephone number (318) 226-6826. Amicus Briefs were filed by Lennie Perez, 729 Royal Street, Baton Rouge, Louisiana 70802, Telephone number (504) 387-1287, on behalf of the 19th Judicial District Public Defender Office; G. Paul Marx, Post Office Box 3622, Lafayette, Louisiana 70502, Telephone number (318) 232-9345, on behalf of the 15th Judicial District Public Defender Office; John LaVern, 326 Pujol Street, Suite 505, Lake Charles, Louisiana 70602, Telephone number (318) 436-1718, of the 14th Judicial District Public Defender Office; Paul Adams, Jr., 1645 Nicholson Drive, Baton Rouge, Louisiana 70802-8143, Telephone number (504) 343-0171, of the Louisiana District Attorney's Association; and, Robert Glass, 228 Lafayette Street, New Orleans, Louisiana 70130, Telephone number (504) 581-9065, on behalf of the Louisiana Association of Criminal Defense Lawyers. The trial judge was Hon. Carl Stewart, First Judicial District Court.

19. Legal Activities:

Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

Probably my most significant legal activity outside of litigation is the researching and annual updating of my book, Louisiana Criminal Trial Practice. This is a one volume, nearly 600 page, compilation of the statutory and jurisprudential law of criminal procedure in this state, from arrest, through pretrial and trial matters, including all evidentiary issues, and ending with post-conviction relief and administrative release. It is a book widely used throughout the state by prosecutors and judges as well as defense lawyers.

I have also had a large pardon and parole practice where I represent prisoners hoping to obtain early release through these administrative remedies. It requires not only a thorough knowledge of the original facts of the offense (which in many cases occurred many years before) but total familiarity with the individual prison's programs, disciplinary policies and housing arrangements and total familiarity with the inmate's daily activities, in work, recreation and optional programs such as athletics, education and vocational training.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

I have an Individual Retirement Account (IRA) which I contributed to over a period of several years. The current balance is approximately \$23,100. I also have a more recent Retirement Plan Account which I have contributed to over more recent years. The current worth of that is approximately \$42,200.00. Those are intended to provide income beginning after the age of sixty.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interests during your initial service in the position to which you have been nominated.

I would fully disclose to all parties in the case of any facts that might constitute a conflict. I would refer the conflict issue to another judge if it cannot be resolved with parties. The initial conflicts of interest I might have would be if I had previously been the attorney for a particular litigant. I don't anticipate any conflicts regarding continuing financial arrangements as I will have none.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court?

No.

4. List sources and amounts of all income received during the calendar year, including all salaries, fees, dividends, interest gifts, rents, royalties, patents, honoraria, and other items exceeding \$500.00 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See Financial Disclosure Report.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

Financial Net Worth Statement is attached with schedules.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidates, dates of the campaign, your title and responsibilities.

I have participated in a number of political campaigns over the past 25 years, virtually all at the basic volunteer level - canvassing, phone banking, putting up signs.

These included candidates for governor (Mississippi and Louisiana), Louisiana State Legislature, Louisiana judicial seats, and local mayor, city council and school board races in New Orleans. I held no position and had no title.

The only campaign in which I had a title was as Finance Chair in a local race for Criminal District Court Judge on behalf of a candidate who was defeated.

AO-10
Rev. 1/93

FINANCIAL DISCLOSURE REPORT

 Report Required by the Ethics
Reform Act of 1989, Pub. L. No.
101-194, November 30, 1989
(5 U.S.C.A. App. 6, §§101-112)

1. Person Reporting (Last name, first, middle initial) <u>BERRIGAN, HELEN G.</u>	2. Court or Organization - <u>United States District Court Eastern District of Louisiana</u>	3. Date of Report <u>Nov. 19, 1993</u>
4. Title (Article III Judges indicate active or senior status; Magistrate Judges indicate full- or part-time) <u>Article III Judge - Active</u>	5. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date <u>Nov. 18, 1993</u> <input checked="" type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final	6. Reporting Period <u>January, 1992 to present</u>
7. Chambers or Office Address <u>Suite 2150 Energy Centre 1100 Poydras Street New Orleans, Louisiana 70163-2150</u>	8. On the basis of the information contained in this Report, it is, in my opinion, in compliance with applicable laws and regulations _____ Reviewing Officer Signature _____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on last page.

I. POSITIONS. (Reporting individual only; see pp. 7-8 of Instructions.)

POSITION

NAME OF ORGANIZATION/ENTITY

☐ NONE (No reportable positions)

Of Counsel Berrigan, Danielson, Litchfield, Olsen, Schonckas + Mann
Of Counsel Berrigan, Litchfield, Schonckas, Mann + Clement
Board of Directors Louisiana Association of Criminal Defense Lawyers

II. AGREEMENTS. (Reporting individual only; see p. 8-9 of Instructions.)

(continued at VIII)

DATE

PARTIES AND TERMS

☒ NONE (No reportable agreements)

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 9-12 of Instructions.)

DATE

SOURCE AND TYPE

GROSS INCOME

(Honorary only)

(yours, not spouse's)

☐ NONE (No reportable non-investment income)

Gravel, Brady and Berrigan (legal fees) \$ 101,300.00
Berrigan, Danielson, Litchfield, Olsen, Schonckas + Mann \$ (S) attorney
Berrigan, Litchfield, Schonckas, Mann + Clement \$ (S) attorney
 \$

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

Helen G. Berrigan

Date of Report

Nov. 19, 1993

V. REIMBURSEMENTS and GIFTS -- transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp.13-15 of Instructions.)

SOURCEDESCRIPTION

NONE (No such reportable reimbursements or gifts)

EXEMPT

VI. OTHER GIFTS. (Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp.15-16 of Instructions.)

SOURCEDESCRIPTIONVALUE

NONE (No such reportable gifts)

EXEMPT

\$ _____

\$ _____

\$ _____

\$ _____

VII. LIABILITIES. (Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp.16-18 of Instructions.)

CREDITORDESCRIPTIONVALUE CODE*

NONE (No reportable liabilities)

Troy Nichols	real estate mortgage	K
National Mortgage Corporation (S)	real estate mortgage	K
American Residential Mortgage (S)	real estate mortgage	L
Equitable Real Estate (S)	real estate mortgage	M

VALUE CODES: J = \$15,000 or less K = \$15,001 to \$50,000 L = \$50,001 to \$100,000 M = \$100,001 to \$250,000
 N = \$250,001 to \$500,000 O = \$500,001 to \$1,000,000 P = More than \$1,000,000

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

Helen G. Berrigan

Date of Report

Nov. 19, 1993

VII. INVESTMENTS and TRUSTS -- income, value, transactions. (Includes those of spouse and dependent children; see pp. 18-27 of Instructions.)

A. Description of Assets (including trust assets) Indicate, where applicable, owner of the asset by using the parenthetical (S) for joint ownership of report- ing individual and spouse, (S) for separate ownership by spouse, (DC) for ownership by dependent child. Place "(X)" after each asset exempt from prior disclosure.	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1)	(2)	(1)	(2)	If not exempt from disclosure				
	Asset Code: (A-B)	Type (e.g., div., rent or int.)	Value: Code: (J-F)	Value Method Code: (Q-S)	(1) Type (e.g., buy, sell, margin, redem- ption)	(2) Date: Month Day	(3) Value: Code: (J-F)	(4) Gain: Code: (A-B)	(5) Identity of party seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)					E	X	E	M	P
1701 Labell St. Unit 82 Baton Rouge, La. rental condo	D	rent	K	W					
2 Cascade Natural Gas, common	A	dividend	J	T					
3 Citicorp., common	A	dividend	J	T					
4 IBM, common	C	dividend	K	T					
5 Transcontinental Corporation	C	dividend	K	T					
6 Salomon Brothers Fund	C	dividend	J	T					
7 Rowe Price	B	dividend	K	T					
8 MGN Corporation, common	A	dividend	J	T					
9 TSEB-Helen G. Roberts w/ W. Jerry McCord Roberts	D	dividend	M	T					
10 Helen G. Roberts Retirement Plans									
11 (A) Liberty Bank & Trust New Orleans, La.	B	interest	K	T					
12 (B) Dreyfus Family of Funds	B	dividend	K	T					
13 (C) IRA-Hibernia National Bank, New Orleans, La.	B	interest	K	T					
14 Liberty Financial Services Preferred (S)	A	none	K	T					
15 Liberty Financial Services Common (S)	A	none	K	T					
16 4319 Hamilton Street (S) New Orleans, La. 4-pkx	E	rent	M	Q					
17 6515-17 Center Street (S) New Orleans, La. townhouse	D	rent	L	W					
18 2213-15 Gen. Taylor Street New Orleans, La. 4-pkx (S)	D	rent	L	W					
19 1708-10 N. Broad Street (S) New Orleans, La. 4-pkx	D	rent	L	W					
20 1632 Esplanade Avenue New Orleans, La. 8 apts (S)	E	rent	L	W					

1 Income/Asset Codes: (See Col. B1 & B4)	A=\$1,000 or less B=\$15,001 to \$50,000 C=\$51,001 to \$100,000 D=\$101,001 to \$500,000 E=\$500,001 to \$1,000,000 F=\$1,000,001 to \$5,000,000 G=\$5,000,001 to \$10,000,000 H=\$10,000,001 to \$50,000,000 I=\$50,000,001 to \$100,000,000 J=\$100,000,001 to \$500,000,000 K=\$500,000,001 to \$1,000,000,000 L=\$1,000,000,001 to \$5,000,000,000 M=\$5,000,000,001 to \$10,000,000,000 N=\$10,000,000,001 to \$50,000,000,000 O=\$50,000,000,001 to \$100,000,000,000 P=\$100,000,000,001 to \$500,000,000,000 Q=\$500,000,000,001 to \$1,000,000,000,000 R=\$1,000,000,000,001 to \$5,000,000,000,000 S=\$5,000,000,000,001 to \$10,000,000,000,000 T=\$10,000,000,000,001 to \$50,000,000,000,000 U=\$50,000,000,000,001 to \$100,000,000,000,000 V=\$100,000,000,000,001 to \$500,000,000,000,000 W=\$500,000,000,000,001 to \$1,000,000,000,000,000 X=\$1,000,000,000,000,001 to \$5,000,000,000,000,000 Y=\$5,000,000,000,000,001 to \$10,000,000,000,000,000 Z=\$10,000,000,000,000,001 to 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FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

Helen G. Berrigan

Date of Report

Nov. 19, 1993

VIII. ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate part of Report.)

I. Positions (cont.) Member Louisiana Sentencing Commission
 Board of Directors; President Committee of 21
 President; Vice-President American Civil Liberties Union of Louisiana
 Board of Directors American Civil Liberties Union
 Member, Steering Committee; Chair Forum for Equality
 Board of Directors Amistad Research Center
 Board of Directors Just for the Record
 Board of Directors Society of Americans for Recovery (SOAR)

VII Investments & Trusts (cont.) 21. Joseph E. Berrigan, Jr. dividend interest M T
 Profit Sharing Plan (s) D

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C.A. app. 7, § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature Helen G. BerriganDate Nov. 19, 1993

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C.A. APP. 6, § 104, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Judicial Ethics Committee
 Administrative Office of the
 United States Courts
 Washington, DC 20544

Financial Net Worth Statement / Schedules:Listed Securites - Schedule (A):

IBM - 393 Shares	\$ 19,551.75
Cascade Natural Gas - 353 Shares	\$ 9,354.50
Citicorp - 320 Shares	\$ 11,120.00
Salomon Bros. Fund Inc. - 1081 Shares	\$ 15,134.00
T. Rowe Price Growth Stock Fund-1063 Shares	\$ 21,598.31
Tri-Continental Corp. - 1210 Shares	\$ 30,250.00
	<u>\$107,003.56</u>

Unlisted Securities - Schedule (B):

Liberty Financial Services, Inc. New Orleans, Louisiana, 10% Cumulative Preferred Stock	\$ 38,825.30
Liberty Financial Services, Common Stock	<u>\$ 19,260.00</u>
	\$ 58,085.30

Real Estate Owned - Schedule (C):

<u>Description</u>	<u>Market Value</u>	<u>Mortgage</u>
4319 Hamilton Street New Orleans, La. (4-Plex)	\$ 240,000.00	- 0 -
6515-17 Center Street New Orleans, La. (double)	\$ 120.00.00	- 0 -
Unit 82, Bocage Condo Baton Rouge, La.	\$ 57,000.00	\$ 24,000.00
2213-15 Gen. Taylor St. New Orleans, La. (4-Plex)	\$ 50,000.00	\$ 41,569.00
National Mortgage Corp., 1355 South Colorado Blvd., Denver, Colo. 80233		
1708-10 N. Broad Street New Orleans, La. (4-Plex)	\$ 80,000.00	\$ 85,241.00
American Residential Mortgage Corp. P.O. Box 85804, San Diego, Ca. 92186-5804		
1632 Esplanade Ave. New Orleans, La. (8 Apartments)	\$ 120,000.00	\$132,213.00
Equitable Real Estate, 5775 E. Peachtree Dunwoy Road, Suite 400, Atlanta, Ga. 303		
Total:	<u>\$ 677,000.00</u>	<u>\$283,023.00</u>

Financial Net Worth Statement / Schedules:Other Assets - Schedule (D):

- | | | |
|-----|---|---------------------|
| (1) | TTEES - Helen G. Roberts u/w
Jerry McCord Roberts Art. 6th
as amended (trust established
by deceased mother) | \$120,414.00 |
| (2) | Helen G. Roberts Retirement Plan Account:
Liberty Bank & Trust Co.,
New Orleans, La. | \$ 24,519.00 |
| | Dreyfus Family of Funds | \$ 18,914.00 |
| | IRA Hibernia National Bank
New Orleans, La. | \$ 23,103.00 |
| (3) | Joseph E. Berrigan, Jr. (husband)
Profit Sharing Plan - Prudential
Securities, | <u>\$230,000.00</u> |
| | | \$416,950.00 |

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged". Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

During my first years of practicing law, I was based in Alexandria, Louisiana. The system there for providing counsel to indigents was to appoint attorneys from the local bar on a rotating basis. While we were authorized to submit a bill for reimbursement on our services, I never did and instead did the work for free. I estimate I was involved in about 100 cases on that basis, both criminal and civil.

Since moving to New Orleans in 1984, I have continued to provide pro bono or near pro bono services to many people on a regular basis. I estimate that 30-40% of my legal practice and time has been in the type of work. These encompass all ranges of primarily criminal representation including a number of death penalty cases at the trial and appellate levels. I was also on contract to handle criminal appeals for indigents in the neighboring Jefferson Parish from 1990 until June 1993. Although my contract ended in June, I have continued to represent about a dozen of the individuals on a pro bono basis as well.

In connection with my community work, I have participated in various fundraising efforts and speaking programs to assist the disadvantaged, primarily the poor and various minority groups. For example, a couple of years ago I was YWCA Role Model and in that capacity spoke to young women in our urban public schools. As another example, last year I co-chaired a major fundraiser on behalf of Lazarus House, a residential facility affiliated with the New Orleans Catholic Archdiocese which houses AIDS victims who are no longer able to live independently. I have also participated in prison programs and workshops to hopefully assist inmates in rehabilitating themselves.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong or have belonged to any organization which discriminates, through either formal membership requirements or the practical implementation of membership policies?

No.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination?

I know of no Selection Commission in my jurisdiction which recommends candidates.

Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

After the election of President Clinton, my two senior law partners recommended me for a federal judgeship to Senators Breaux and Johnston.

I also obtained recommendations from members of the legal community, political organizations, labor and business leaders and minority representatives.

Subsequent to being recommended by the two senators, I filled out various forms and was interviewed by officials in the Justice Department, the F.B.I. and the American Bar Association.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or questions, If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

Under our system of separation of powers, the legislature has the responsibility of promulgating the general laws and policies affecting society as a whole. The judiciary is a separate branch of government with an entirely different responsibility. The courts are mandated to resolve particular conflicts between individual parties who have a specific genuine dispute. The parties should clearly be entitled to a legal resolution of their problem at that time or else the court should decline the case. The courts are to apply the constitution and the general law to that specific dispute and decide which party is entitled to prevail. The decision and remedy should be limited to those particular parties. The reasoning behind the decision should likewise be narrowly confined to the type of conflict set forth in the case.

5.

The courts do have a unique responsibility of determining the constitutionality of statutes and laws, as promulgated and as applied. However even in those situations, the court's role should generally be confined to that basic decision, leaving the legislature and executive branch to respond with whatever affirmative steps need be taken to restore constitutionality.

AFFIDAVIT

I, Helen Ginger Berrigan, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

11/23/93
(Date)

Helen Ginger Berrigan
(Name)

Arthur S. Mann, III
(Notary)

ARTHUR S. MANN, III
Notary Public, Parish of Orleans, State of La.
My Commission is issued for life.

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

Tucker Lee Melancon

2. Address: List current place of residence and office address(es).

Residence 604 North Monroe Street
Marksville, Louisiana 71351

Office P. O. Box 211
Marksville, Louisiana 71351

3. Date and place of birth.

February 3, 1946
Bryan, Texas

4. Marital status (include maiden name of wife, or husband's name).
List spouse's occupation, employer's name and business address(es).

Katherine Ascher Melancon.
Homemaker.

5. Education: List each college and law school you have attended,
including dates of attendance, degrees received, and dates degrees
were granted.

Louisiana State University, Baton Rouge, Louisiana,
1964-1968, Bachelor of Science, May 25, 1968
Tulane University School of Law, New Orleans, Louisiana,
1970-1973, Juris Doctor, May 11, 1973

Summer schools attended:
Louisiana State University at Alexandria, Alexandria,
Louisiana, 1965 and 1966
Loyola University, New Orleans, Louisiana, 1969
Louisiana State University School of Law, Baton Rouge,
Louisiana, 1971

I also attended Loyola University School of Law, Night Division,
New Orleans, Louisiana, for a brief period in the fall of 1968. I
resigned due to the demands of my teaching profession.

6. Employment Record: List (by year) all business or professional
corporations, companies, firms, or other enterprises, partnerships,
institutions and organizations, nonprofit or otherwise, including
firms, with which you were connected as an officer, director,
partner, proprietor, or employee since graduation from college.

- 1968-1969 Science/Physical Education Teacher
Jefferson Parish School Board
Gretna, Louisiana
- 1973-1975 Associate
Knoll & Knoll
Attorneys at Law
Marksville, Louisiana
- 1975-1983 Member, Board of Directors, Secretary-Treasurer,
Avoyelles Holding Company, Inc., d/b/a,
Briarwood Motel
Bunkie, Louisiana
- 1975-1983 Solo law practice
Marksville, Louisiana
- 1976-1987 Member, Board of Directors, Secretary-Treasurer
Mar-Dan Enterprises, Ltd., d/b/a, Melancon Funeral
Home and Melancon Monument Company
Bunkie, Louisiana
- 1976-1979 Member, Board of Directors
W. Belmont Townsend Memorial Foundation,
Inc. (non profit corporation), d/b/a,
Epps House
Bunkie, Louisiana
- 1978-1980 Member, Board of Directors, Secretary-Treasurer,
E-Z Shop of Alexandria, Inc., d/b/a E-Z
Shop
Marksville, Louisiana
- 1980-1981 Member, Board of Directors, Secretary-Treasurer,
Son of Son, Inc., d/b/a, Mike Anderson's Seafood
Restaurant
Mansura, Louisiana
- 1984-present Managing Partner
Melancon & Rabalais
Attorneys at Law
Marksville, Louisiana
- 1985-1987 Member, Board of Directors, Secretary-Treasurer,
Laco Premium Plan, Inc., d/b/a, Laco,
Marksville, Louisiana
- 1987-1988 Member, Board of Directors, Secretary-Treasurer,
Southeast Central Louisiana Premium Finance
Company, d/b/a, SECLA
Marksville, Louisiana

1989-1992 Member, Advisory Board
Catalyst Old River Hydroelectric Partnership
Vidalia, Louisiana

1992-present Member, Board of Directors
Catalyst Vidalia Corporation
New York, New York

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Not applicable.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Avoyelles Parish Bar Association, President, 1977-1978

Louisiana State Bar Association, House of Delegates,

1973-1975, 1990-present

Bar Association of the Fifth Federal Circuit

Louisiana Trial Lawyers Association, President's

Advisory Board, 1979-1980, 1985-1986, 1987-1988,

1990-present

American Trial Lawyers Association

American Inns of Court, Alexandria-Pineville Chapter

American Judicature Society

Louisiana Workers' Compensation Advisory Board, 1990-1991

Committee to Study Backlog in the Courts of Appeal,

First and Third Circuits, by appointment of the Louisiana

Supreme Court, 1991

10. Other memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Louisiana Trial Lawyers Association

American Trial Lawyers Association

The Environmental Defense Fund

The National Eagle Scouts Association

The New Orleans Track Club (running club, no facilities, race sponsor)

Louisiana Public Broadcasting

11. Court admissions: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Louisiana State Bar, October 5, 1973
 United States District Court, Eastern District of Louisiana,
 November 13, 1974
 United States Court of Appeals, Fifth Circuit,
 July 26, 1979
 United States District Court, Middle District of Louisiana,
 October 8, 1980
 United States District Court, Western District of
 Louisiana, September 16, 1985
 United States Supreme Court, November 4, 1985
 United States District Court, District of
 Nevada on a single case basis, petition filed
 February 4, 1992

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

None.

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. My last physical examination was on May 12, 1992

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

None.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Not applicable.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

I was appointed by the Bunkie, Louisiana, City Council to serve on the Bunkie Airport Authority from 1974 to 1978.

I was appointed by the Assistant Secretary of Labor of the State of Louisiana to serve on the Louisiana Workers' Compensation Advisory Board from 1990 to 1991.

17. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

Not applicable.

2. whether you practiced alone, and if so, the addresses and dates;

May 15, 1975 to August 1980.

116 East Mark Street
Marksville, Louisiana 71351

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

August 1, 1973-
May 14, 1975

Associate
Knoll & Knoll
Attorneys at Law
P. O. Box 426
Marksville, Louisiana 71351

General civil practice, including plaintiffs' personal injury and workers' compensation litigation, real estate, domestic relations, successions (probate), and commercial practice.

May 15, 1975-
December 31, 1983

Solo Practitioner
116 East Mark Street
Marksville, Louisiana 71351
(associate Rodney M. Rabalais
hired in 1980)

General civil and criminal practice,
including plaintiffs' personal injury
and workers' compensation litigation,
felony and misdemeanor criminal defense,
(1975-1980), real estate, domestic
relations, successions (probate), and
commercial practice.

January 1, 1984-
present

Managing Partner
Melancon & Rabalais
Attorneys at Law
Marksville, Louisiana, 71351

General civil practice, plaintiff and defense
with an emphasis on personal injury and
workers' compensation litigation, and also
including commercial litigation, corporate
law, domestic relations, successions
(probate), and real estate.

- b. 1. What has been the general character of your law practice,
dividing it into periods with dates if its character
has changed over the years?

While I still handle plaintiffs' personal injury cases, successions
(probate), and a number of corporate clients, over the last two
years my practice has become more defense oriented. Currently
the majority of my time is devoted to defense work for Guarantee
Mutual Life Insurance Company; the Louisiana Sheriff's
Risk Management Program; Imperial Fire & Casualty Insurance
Company; the State of Louisiana, Department of Transportation
& Development; and the Avoyelles Parish Sheriff's Department.
My prior practice is listed in my response to question 17(a)(3).

2. Describe your typical former clients, and mention the
areas, if any, in which you have specialized.

The Avoyelles Parish Sheriff's Department(The Law
Enforcement District of the Parish of Avoyelles,
State of Louisiana), general counsel
Louisiana Sheriff's Risk Management Program, liability
defense
Guarantee Mutual Life Insurance Company, workers'
compensation defense

Imperial Fire & Casualty Insurance Company, liability defense

State of Louisiana, Department of Transportation & Development and Department of Public Safety and Corrections, liability defense

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I have appeared regularly in court. However, in the last two to three years, I have appeared somewhat less frequently because of the changing nature of my practice; the increasing amount of defense work; the removal of workers' compensation cases from state district courts to the Office of Workers' Compensation Administration; and the hiring of an associate.

2. What percentage of these appearances was in:

(a) federal courts;
1%

(b) state courts of record;
94%

(c) other courts.

Louisiana Office of Workers' Compensation Administration, workers' compensation trials and related matters--5%.

3. What percentage of your litigation was:

(a) civil;

99%

(b) criminal.

1%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

300 to 400 cases as sole counsel, approximately
20 cases as associate counsel.

5. What percentage of these trials was:
 (a) jury;

1%

- (b) non-jury.

99%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

The cases I selected in response to this question are significant only to the parties I represented and to me. However, they are representative of my practice and of my litigation experience. A summary of the information requested for each case, in reverse chronological order, is attached hereto as Appendix I.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

In 1990 I was appointed to the Louisiana Workers' Compensation Advisory Board by the Assistant Secretary of Labor. The Board was set up pursuant to Louisiana Revised Statute 23:1291B.(14) and consisted of five members. The Board's role was to assist the Director of the Office of Workers' Compensation Administration in the development and implementation of policies and procedures for the Workers' Compensation Administrative Hearing Process that was removed from the state district courts in 1990.

A summary of four cases I handled that were settled after litigation was instituted, but prior to trial, in chronological order, is attached hereto as Appendix II.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List all sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.
 - a. I intend to dissolve my law partnership, Melancon & Rabalais, with my law partner, Rodney M. Rabalais, in strict adherence to and compliance with Canons of the Code of Conduct for United States Judges and all rules and regulations of the Judicial Conference of the United States and of the American Bar Association that relate thereto. The details of the agreement to dissolve the partnership have not yet been determined, but I would expect to receive periodic compensation for the sale of my interest in the partnership.
 - b. As part of my firm's fee for representing the plaintiffs in a wrongful death action in 1989 I received New York Life Insurance Company annuity policy no. FP200509, annuitant's no. 1A10530 providing the following annuity benefits stream: Annuity payment of \$2,193.35 per month beginning 01/02/2001, payable while I am living, or until at least 240 such payments have been made.
 - c. Through inheritance and investment, I have royalty and working interest ownership in gas and oil wells operated by Campac Eighty-Two Limited Partnership, Jeems Bayou Production Corporation, Brammer Engineering, and Fina that will produce future income.
2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

I will not sit on or participate in any case in which my law partner, Rodney M. Rabalais, or anyone associated with my law partner has an interest.

I will not sit on any case involving a former client for the period prescribed by the Code of Conduct for United States Judges. I will not sit on any cases involving a person, corporation, or partnership with which I have a business or financial interest. By employing the foregoing procedure, I do not anticipate any conflicts of interest during my initial service on the bench. Should a conflict arise I will follow the guidelines of the Code of Conduct for United States Judges.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (if you prefer to do so, copies of financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

My Financial Disclosure Report is attached hereto.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

My Financial Statement is attached hereto.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Yes.

- | | |
|------|---|
| 1992 | State wide Co-Chair, Louisiana Democratic Party
"Victory Fund '92"; |
| 1990 | Fifth Congressional District of Louisiana
Coordinator, Senator J. Bennett Johnston's
U. S. Senate re-election campaign; |

- 1986 District coordinator, Congressman John Breaux's U. S. Senate Campaign;
- 1984 Eighth Congressional District of Louisiana, co-coordinator for Mondale/Ferraro ticket;
- 1984 Eighth Congressional District of Louisiana coordinator for Senator Gary Hart

Since 1985 in my capacity as Democratic National Committeeman, I have made appearances with or on behalf of numerous Democratic candidates for national, state, and local office.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

Due to the nature of my firm's practice and the size of the city and parish(county) which we serve, pro bono legal work is regularly provided to people who cannot afford to retain an attorney on a walk in basis. My firm and I also participate in a program sponsored by Acadiana Legal Service Corporation, formerly Central Louisiana Legal Services, Inc. in providing legal services for people who cannot afford to retain an attorney in civil cases at a nominal hourly rate of \$25.00 for work performed out of court and \$35.00 for court appearances with a maximum fee of \$250.00 per case. Prior to establishment of an indigent defender system for criminal defendants in Avoyelles Parish, Louisiana, I voluntarily participated in the court sponsored indigent defender program. The amount of time devoted to pro bono and Acadian Legal Services varies, but would average 4 to 6 hours per month.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates—through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

No.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end

(including the circumstances which led to your nomination and interviews in which you participated).

There is no selection commission for Louisiana. I met with Senator John Breaux and Senator J. Bennett Johnston. I also spoke with Congressmen William Jefferson, Billy Tauzin, Cleo Fields, Jimmy Hays, and Governor Edwin Edwards. I was contacted by the Clinton Administration, filled out various forms, interviewed at the Department of Justice, interviewed by an agent of the Federal Bureau of Investigation and interviewed by a representative of the American Bar Association.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives(sic) of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional

requirements such as standing and ripeness; and

- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The United States Constitution's establishment of three separate and co-equal branches of government is the cornerstone of our Republic. If the Judicial Branch is to fulfill its constitutional role, I believe traditional jurisdictional requirements such as standing and ripeness must be adhered to.

While the Judicial Branch has the duty to ensure that the actions of the Legislative and Executive Branches meet constitutional standards, I believe the proper role of the Judiciary is to resolve the dispute of the parties before the Court in a manner so that the decision affects, to the extent possible, only the parties. That is not to say, with the complexities of human society, situations do not arise where in reaching a resolution of the dispute between the parties a court's decision will not have far-reaching effects. That a decision may have far-reaching effects should not deter the Court from resolving the dispute of the parties before it, if jurisdictional requirements are met. In resolving the dispute between the parties the doctrine of Stare Decisis should be followed when applicable.

My experience as a lawyer in dealing with courts with continuing oversight responsibilities has been limited, but has led me to believe that such procedure should be used sparingly and only as a last resort. Care must be taken to assure that the overseeing court is not usurping administrative or legislative power. Rather than assisting in resolving disputes and encouraging settlement, my personal experience has been that additional litigation has resulted, attorney's fees and related expenses are increased, and disputes that could and should be resolved by parties are not.

APPENDIX II
CASE #2

NAME OF CASE:

Carol Ann Lachney Turner, et al vs. United States Fidelity & Guarantee Insurance Company, et al

COURT AND CASE DOCKET NO.:

Twelfth Judicial District Court of Louisiana
Suit #87-1131-A

United States District Court
Western District of Louisiana
Alexandria Division
Suit #87-0441

PERIOD OF REPRESENTATION:

October 15, 1986 to March 23, 1989

PARTY I REPRESENTED AND NATURE OF MY PARTICIPATION IN THE LITIGATION:

Carol Ann Lachney Turner, individually and as duly appointed Natural Tutrix of her minor children, Tanisha Sheree Turner, Naomi Anganette Turner, Jason Edward Turner & Hillary Scott Turner, and Sabrina Turner Deville, sole counsel

NAME, ADDRESS AND TELEPHONE NUMBER OF COUNSEL, FOR EACH OTHER MAJOR PARTY:

Larry A. Stewart
Stafford, Stewart & Potter
P.O. Box 1711
Alexandria, LA 71309
(318) 487-4910
Attorney for United States Fidelity & Guaranty Company

Madison C. Moseley
Blue, Williams & Buckley
3421 North Causeway Boulevard
9th Floor
Metairie, LA 70002
(504) 831-4091
Attorney for Northfield Insurance Company

* There were several other counsel for other defendants, but those listed above were the attorneys for the major defendants.

APPENDIX II
CASE #2 - PAGE 2

SUMMARY OF THE CASE:

This wrongful death action arose out of an accident that occurred on October 1, 1986. My clients' husband and father was killed when he drove a truck into the side of an 18 wheeler truck-trailer that was straddling the road after becoming stuck on the shoulder of the road while attempting to make a U turn. The deceased's truck was struck from the rear by a Volkswagon, which resulted in the death of the driver and severe injury to a passenger. The two cases were consolidated for trial purposes. There was a serious question about the defendants' liability because of the status of the truck driver, employee or independent contractor. Several days prior to trial, my clients' claims were settled by structured settlement and cash with a total value of \$587,500.00.

APPENDIX II
CASE #3

NAME OF CASE:

Mathilda Gaspard Prevot, individually and as Natural Tutrix of the Minor, Julie Ann Prevot, and Mary Elizabeth Prevot, as Natural Tutrix of the Minor, Sarah M. Lee Prevot vs. Government Employee's Insurance Company

COURT AND CASE DOCKET NO.:

Twelfth Judicial District Court of Louisiana
Suit #87-14628-A

PERIOD OF REPRESENTATION:

October 1, 1987 to April 1, 1989

PARTY I REPRESENTED AND NATURE OF MY PARTICIPATION IN THE LITIGATION:

Mathilda Gaspard Prevot, individually, and as Natural Tutrix of the minor, Julie Ann Prevot, sole counsel

NAME, ADDRESS AND TELEPHONE NUMBER OF COUNSEL FOR EACH OTHER PARTY:

Nelson M. Lee
P.O. Box 88
Bunkie, LA 71322
(318) 346-2364
Attorney for Mary Elizabeth Cecil Prevot, as Natural Tutrix for the minor, Sarah M. Lee Prevot

Russell L. Potter
Stafford, Stewart & Potter
P.O. Box 1711
Alexandria, LA 71309
(318) 487-4910
Attorney for Government Employees Insurance Company

SUMMARY OF THE CASE:

This wrongful death action arose out of the death of my clients' husband and father and two other men in a single car accident that occurred on August 30, 1987. No witnesses to the accident could identify which of the three men was driving the vehicle at the time of the accident. Conflicting claims were made by the heirs of each of the three men. Separate suits filed by the three men's heirs were consolidated for trial. Several days prior to trial, my clients' claims were settled by structured settlement and cash with a total value of \$400,000.00.

APPENDIX II
CASE #4

NAME OF CASE:

James J. Ponthier vs. Bill Belt, in his Capacity as duly Elected Sheriff of Avoyelles Parish, Louisiana

COURT AND CASE DOCKET NO.:

Twelfth Judicial District Court of Louisiana
Suit #90-5111-B

PERIOD OF REPRESENTATION:

November 2, 1989 to November 30, 1991

PARTY I REPRESENTED AND NATURE OF MY PARTICIPATION IN THE LITIGATION:

James J. Ponthier and Phyllis Ponthier - sole counsel

NAME, ADDRESS AND TELEPHONE NUMBER OF COUNSEL FOR EACH OTHER MAJOR PARTY:

Donald C. Brown
Woodley, Williams, Fenet, Palmer, Boudreaux & Norman
P.O. Drawer EE
Lake Charles, LA 70602-3731
(318) 433-6328
Attorney for Bill Belt & Louisiana Sheriff's Risk Management Program

Allen T. Usry
Usry & Weeks
P.O. Box 6645
Metairie, LA 70002
(504) 833-4600
Attorney for Bill Belt & Louisiana Sheriff's Risk Management Program

SUMMARY OF THE CASE:

This personal injury case arose as a result of the escape of three inmates from the Avoyelles Parish Jail in Marksville, Louisiana, and the encounter that plaintiff, his wife and children had with the inmates at plaintiff's home on the night of the escape. As a result of the encounter, plaintiff suffered psychiatric/psychological damages due to a pre-existing psychological condition. The case was settled several days before the trial for the sum of \$130,000.00. After the conclusion of this case, I was retained as attorney for the Avoyelles Parish Sheriff's Department and the Louisiana Sheriff's Risk Management Program.

AO-10
Rev. 1/91

FINANCIAL DISCLOSURE REPORT

Report Required by the Ethics
Reform Act of 1985, Pub. L. No.
101-194, November 23, 1989
15 U.S.C.A. App. E, 101-1002

1 Person Reporting (Last name, first, middle initial) MELANCON, TUCKER L.	2 Court or Organization USDC FOR W.DIST OF LA-MONROE	3 Date of Report D 11/19/93
4 Title (Article III judges indicate active or senior status; Magistrate judges indicate full or part-time) NOMINEE-ARTICLE III JUDGE	5 Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date 11/18/93 <input type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final	6 Reporting Period 1/1/92-11/19/93
7 Chambers or Office Address ROOM 201, FEDERAL BUILDING 201 JACKSON STREET MONROE, LOUISIANA 71201	8 On the basis of the information contained in this Report, it is, in my opinion, in compliance with applicable laws and regulations _____ Reviewing Officer Signature _____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on last page.

I. POSITIONS. (Reporting individual only; see pp. 7-8 of Instructions.)

POSITION	NAME OF ORGANIZATION/ENTITY
<input type="checkbox"/> NONE (No reportable positions)	
MANAGING PARTNER	MELANCON & RABALAIS, ATTORNEYS AT LAW
TRUSTEE	MELANCON & RABALAIS PEN & PROF SHARING TRUST
CONSULTANT	KEROTEST MANUFACTURING CORPORATION

II. AGREEMENTS. (Reporting individual only; see pp. 8-9 of Instructions.)

DATE	PARTIES AND TERMS
<input checked="" type="checkbox"/> X NONE (No reportable agreements)	

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 9-12 of Instructions.)

DATE (Monrovia only)	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
<input type="checkbox"/> NONE (No reportable non-investment income)		
1 1992	MELANCON & RABALAIS, ATTORNEYS AT LAW-NET BUSINESS INCOME	\$ 141711.00
2 1993	MELANCON & RABALAIS, ATTORNEYS AT LAW-GROSS BUSINESS INCOME	\$ 246500.00
3 1992	CATALYST OLD RIVER HYDRO ELEC LTD PTN-BOARD OF ADVISOR FEES	\$ 2500.00
4 1992/93	CATALYST VIDALIA CORPORATION-BOARD OF DIRECTORS FEES	\$ 17000.00
5 1992	MARATHON OIL COMPANY - OIL ROYALTY	\$ 578.00

FINANCIAL STATEMENT
NET WORTH
NOVEMBER 1, 1993

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks	25	000	00	Notes payable to banks—secured			
U.S. Government securities—add schedule				Notes payable to banks—unsecured			
Listed securities—add schedule	16	931	33	Notes payable to relatives	35	858	2
Unlisted securities—add schedule	55	693	16	Notes payable to others			
Accounts and notes receivable:				Accounts and bills due			
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid tax and interest			
Doubtful				Real estate mortgages payable—add schedule	191	601	0
Real estate owned—add schedule	390	809	22	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts—itemize:			
Autos and other personal property	202	900	00				
Cash value—life insurance	4	716	77				
Other assets—itemize:							
Individual Retirement Accounts, Pension & Profit Sharing Accounts & Annuity	300	556	36				
Mineral Interests	113	890	00	Total Liabilities	227	459	3
				Net Worth	883	037	50
Total Assets	1,110	496	84	Total Liabilities and net worth	1,110	496	84
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, cosigner or guarantor	81	930	78	Are any assets pledged? (Add schedule.)	No		
On leases or contracts	NONE			Are you defendant in any suits or legal actions?	No		
Legal Claims	NONE			Have you ever taken bankruptcy?	No		
Provision for Federal Income Tax	NONE						
Other special debt	NONE						

TUCKER L. MELANCON & KATHERINE ASCHER MELANCON
FINANCIAL STATEMENT
NET WORTH
November 1, 1993

ASSETS

I. LISTED SECURITIES

1. Fifty (50) shares of Life Insurance Company of Alabama, \$5.00 par value, as of 12/10/92	775.00
2. One hundred nine (109) shares of Life Insurance Company of Alabama, \$1.00 par value, as of 12/10/92	218.00
3. Five hundred ten (510) shares of American General Corporation common stock	14,988.90
4. 36.7 shares of Janus Twenty Fund, Inc.	949.43

TOTAL VALUE OF LISTED SECURITIES \$ 16,931.33

II. UNLISTED SECURITIES

1. Twenty-five (25) shares of Mar-Dan Enterprises, Ltd., d/b/a, Melancon Funeral Home & Monument Company, Bunkie, Louisiana, representing twenty-five per cent (25%) of the outstanding stock	50,000.00
2. Fifty-two (52) shares of Mansura Bancshares, Inc., Mansura, Louisiana	693.16
3. Ninety (90) shares of Southeast Central Louisiana Premium Finance Company, Cottonport, Louisiana, representing ten per cent (10%) of the outstanding stock	5,000.00

TOTAL VALUE OF UNLISTED SECURITIES \$ 55,693.16

III. REAL ESTATE OWNED

1. Camp and 4 lots, Second Ward, Avoyelles Parish, Louisiana	15,000.00
2. 62.39 acres, Allen Parish, Louisiana undivided 33.33% interest	8,318.66
3. 14.25 acres, Union Parish, Louisiana undivided 33.33% interest	2,375.00
4. 80 acres, Desoto Parish, Louisiana undivided 6.667% interest	2,134.40

5.	50 acres, Desoto Parish, Louisiana undivided 6.667% interest	1,333.33
6.	40 acres, Desoto Parish, Louisiana undivided 33.33% interest	5,333.33
7.	80 acres, Desoto Parish, Louisiana undivided 1.6% interest	512.00
8.	238.5 acres, Red River Parish, Louisiana undivided 1.2% interest	1,045.00
9.	22.63 acres, Avoyelles Parish, Louisiana undivided 50% interest	5,657.50
10.	Family home located at 604 North Monroe Marksville, Louisiana	150,000.00
11.	Unit #A of the 122 East Mark Street Condominium, Marksville, Louisiana	100,000.00
12.	Condominium, San Diego, California	99,000.00
13.	Lot located in Section 10, T9S, R5E, St. Martin Parish, Louisiana	100.00
TOTAL VALUE OF REAL ESTATE OWNED		390,809.22

TUCKER L. MELANCON & KATHERINE ASCHER MELANCON
FINANCIAL STATEMENT
NET WORTH
NOVEMBER 1, 1993

LIABILITIES

I. REAL ESTATE MORTGAGES PAYABLE

1. Cottonport Bank, Cenla Branch, Marksville, Louisiana	62,947.14
2. Great Western Savings, Northridge, California	18,803.60
3. Hibernia National Bank, Alexandria, Louisiana	93,992.06
4. Future Holder, Betty Lee Circle, San Diego, California	15,858.27

TOTAL REAL ESTATE MORTGAGES PAYABLE \$ 191,601.07

APPENDIX I
CASE #1

NAME OF CASE:

Rachel Littleton Charrier vs. Oak Haven Nursing Home, Inc.

TRIAL COURT AND CASE DOCKET NO.

Twelfth Judicial District Court of Louisiana, docket #89-3993

CITATION OF CASE IF REPORTED:

Not applicable.

PARTY I REPRESENTED AND NATURE OF MY PARTICIPATION IN THE LITIGATION:

Plaintiff, Rachel Littleton Charrier, sole counsel

DATE OR DATES OF TRIAL

March 8, 1991

NAME OF JUDGE BEFORE WHOM CASE WAS TRIED:

Honorable Harold J. Brouillette, Judge, Twelfth Judicial District Court, Division "B"

NAME, ADDRESS, AND TELEPHONE NO. OF CO-COUNSEL:

Not applicable.

NAME, ADDRESS, AND TELEPHONE NO. OF COUNSEL FOR EACH OTHER PARTY:

Joseph Kutch
P. O. Box 8028
Pineville, Louisiana 71360
(318) 442-4989

SUMMARY OF THE CASE:

This workers' compensation claim arose out of a June 8, 1989 accident. Suit was filed on October 25, 1989, resulting in defendant's insurer agreeing to pay past due medical travel expenses, statutory penalties, and attorney's fees. Defendant's insurer continued to pay weekly workers' compensation and other benefits due under the Louisiana Workers' Compensation Act until it failed to timely pay a charge for physical therapy services rendered to plaintiff. On January 7, 1991, a Rule to Show

APPENDIX I
CASE #1, PAGE 2

Cause Why Medical Expenses Under the Louisiana Workers' Compensation Act Should Not be Paid, for Penalties, Interest, and Attorney's Fees was filed. Extensive discovery was conducted including taking the deposition of the adjuster handling the claim for the insurer and the deposition of the branch claims manager. Numerous other discovery requests, including Subpoena Duces Tecum for internal documents and medical records, Request for Admissions, and Interrogatories, were filed. Defendants, through their attorney, filed a Motion for Sanctions against me alleging that the sixty day time period set out in the Louisiana Workers' Compensation Act for payment of medical expenses after receipt had not elapsed when I filed plaintiff's Rule. The defendants also filed Exceptions of No Cause of Action and in the alternative, Prematurity. In response to defendant's Motion for Sanctions, I filed an answer and request for reasonable expenses and attorney's fees.

FINAL DISPOSITION OF THE CASE:

The trial on the merits of the Rule was conducted on March 8, 1991. Judgment was rendered in plaintiff's favor dismissing defendant's Exceptions, granting judgment in favor of plaintiff for medical expenses incurred, finding defendants arbitrary and capricious in failing to timely pay plaintiff's medical expenses and awarding attorney's fees. Defendant's request for sanctions was denied and sanctions were granted in favor of plaintiff and me against defendants and their attorney for expenses incurred in defending the Motion for Sanctions.

APPENDIX I
CASE #2

NAME OF CASE:

State of Louisiana, through the Department of Health & Human Resources,
Office of Family Security in the interest of Codi Chenvert vs. Dale Clark

TRIAL COURT AND CASE DOCKET NO.

Twelfth Judicial District Court of Louisiana, docket #88-2503-A
Court of Appeal, Third Circuit, State of Louisiana, docket #91-6

CITATION OF CASE IF REPORTED:

Not applicable--not designated for publication.

PARTY I REPRESENTED AND NATURE OF MY PARTICIPATION IN THE LITIGATION:

Defendant, Dale Clark, sole counsel

DATE OR DATES OF TRIAL

October 23, 1990

NAME OF JUDGE BEFORE WHOM CASE WAS TRIED:

Honorable Michael J. Johnson, Judge Twelfth Judicial District Court,
Division "A"

NAME, ADDRESS, AND TELEPHONE NO. OF CO-COUNSEL:

Not applicable.

NAME, ADDRESS, AND TELEPHONE NO. OF COUNSEL FOR EACH OTHER PARTY:

Carl Koehler, Staff Attorney
State of Louisiana
900 Murray Street
Alexandria, Louisiana 71301
(318) 487-5202

SUMMARY OF THE CASE:

The State of Louisiana filed suit against the defendant to establish paternity and support for a minor child allegedly born out of a sexual relationship with the child's mother. Defendant admitted having one act of sexual intercourse with the child's mother, but denied that he was the father of the child, that he had ever acknowledged he was the father of the child, or that he had offered money to the mother of the child or the

APPENDIX I
CASE #2

grandmother of the child to assist with medical expenses incurred in connection with the birth of the child. Suit was filed on September 16, 1988. Defendant was ordered to undergo a blood test by the court. The blood test resulted in a combined paternity index of 104 to 1 and a probability of paternity of 99.05% as compared to an untested, unrelated man of the North American Caucasian population. The depositions of the mother and several of her witnesses were taken.

FINAL DISPOSITION OF THE CASE:

After several delays, trial on the merits was conducted on October 23, 1990. At the close of the State's case, judgment was rendered in favor of defendant. On November 27, 1990, the State filed a Motion to Appeal the trial court's decision with the Court of Appeal, Third Circuit of the State of Louisiana. The Court of Appeal considered the matter without argument on briefs submitted by the parties and on May 12, 1992, in a percuriam opinion, upheld the trial court.

APPENDIX I
CASE #3

NAME OF CASE:

Johnny H. Dauzat vs. Mardel Products Co., Inc.

TRIAL COURT AND CASE DOCKET NO.

Twelfth Judicial District Court of Louisiana, docket #90-4258-A

CITATION OF CASE IF REPORTED:

Not applicable.

PARTY I REPRESENTED AND NATURE OF MY PARTICIPATION IN THE LITIGATION:

Defendant, Mardel Products Co., Inc., sole counsel

DATE OR DATES OF TRIAL

August 7, 1990

NAME OF JUDGE BEFORE WHOM CASE WAS TRIED:

Honorable William A. Culpepper, retired Judge, Third Circuit Court of Appeal, sitting ad hoc by appointment of the Louisiana Supreme Court.

NAME, ADDRESS, AND TELEPHONE NO. OF CO-COUNSEL:

Not applicable.

NAME, ADDRESS, AND TELEPHONE NO. OF COUNSEL FOR EACH OTHER PARTY:

Thomas R. Wilson
P. O. Drawer 1630
Alexandria, Louisiana 71309-1630
(318)442-8658

SUMMARY OF THE CASE:

This workers' compensation case arose as a result of an alleged back injury suffered by plaintiff on August 25, 1989, while making a delivery of wood products for defendant. Plaintiff filed suit on January 24, 1990, after going through the administrative procedure then in effect with the Louisiana Office of Workers' Compensation Administration. Several depositions were taken including plaintiff's deposition and plaintiff's treating physician's deposition; extensive interviews with fact witnesses and co-workers were conducted.

APPENDIX I
CASE #3 - PAGE 2

FINAL DISPOSITION OF THE CASE:

Trial of the matter took place on August 8, 1990, and Written Reasons for Judgment were handed down on September 26, 1990. Judgment was signed on October 3, 1990, dismissing plaintiff's claim at his cost.

APPENDIX I
CASE #4

NAME OF CASE:

Ronald J. Dalgo vs. Martco Partnership

TRIAL COURT AND CASE DOCKET NO.

Twelfth Judicial District Court of Louisiana, docket #89-3430
Third Circuit Court of Appeal, State of Louisiana, docket #90-272

CITATION OF CASE IF REPORTED:

Not designated for publication.

PARTY I REPRESENTED AND NATURE OF MY PARTICIPATION IN THE LITIGATION:

Plaintiff, Ronald J. Dalgo, sole counsel

DATE OR DATES OF TRIAL

October 31, 1989

NAME OF JUDGE BEFORE WHOM CASE WAS TRIED:

Honorable William A. Culpepper, retired Judge, Third Circuit Court of Appeal, sitting ad hoc by appointment of the Louisiana Supreme Court

NAME, ADDRESS, AND TELEPHONE NO. OF CO-COUNSEL:

Not applicable.

NAME, ADDRESS, AND TELEPHONE NO. OF COUNSEL FOR EACH OTHER PARTY:

John F. Wilkes, III
ONEBANE, DONOHUE, BERNARD, TORIAN, DIAZ, MCNAMARA, & ABELL
P. O. Drawer 3507
Lafayette, Louisiana 70502
(318)237-2660

SUMMARY OF THE CASE:

This workers' compensation claim arose as a result of an injury to plaintiff's left knee which occurred on May 3, 1988. He was struck by the carriage of a piece of equipment on which he had been working causing a three inch laceration to his knee. Plaintiff was initially seen by defendant's company doctor, a general practitioner, who referred him to an orthopaedic surgeon. Plaintiff was then referred to a second orthopaedic

APPENDIX I
CASE #4, PAGE 2

surgeon who specializes in knee surgery. The company orthopaedist also referred plaintiff to a psychologist to participate in a pain and trauma management program. Weekly workers' compensation benefits were paid to plaintiff from the date of his injury until March 10, 1989.

On May 30, 1989, suit was instituted on plaintiff's behalf seeking reinstatement of weekly compensation benefits, reimbursement of medical expenses incurred by or on behalf of plaintiff, penalties, and attorney's fees. Pre-trial discovery consisted of eighteen depositions, three of which were medical depositions and fifteen fact depositions. The medical depositions indicated plaintiff suffered from Reflex Sympathetic Dystrophy in his left knee secondary to the trauma he experienced on May 3, 1988. Medical testimony also indicated Reflex Sympathetic Dystrophy was a little known malady involving the sympathetic nerve system usually secondary to trauma, resulting in constant and sometimes excruciating pain.

FINAL DISPOSITION OF THE CASE

The trial on the merits of this matter was conducted on October 31, 1989; Written Reasons for Judgment were filed on December 15, 1989, and formal judgment was signed on January 11, 1990 dismissing plaintiff's suit at plaintiff's cost. On January 19, 1990, a Devolutive Appeal was filed with the Court of Appeal, Third Circuit, State of Louisiana. Argument of the appeal took place on August 27, 1991 and on October 2, 1991, judgment was rendered affirming the trial court's decision.

APPENDIX I
CASE #5

NAME OF CASE:

Charles Gene Kelone vs. Insurance Company of North America/Aetna Insurance Company

TRIAL COURT AND CASE DOCKET NO.

Twelfth Judicial District Court of Louisiana, docket #86-9123-A

CITATION OF CASE IF REPORTED:

Not applicable.

PARTY I REPRESENTED AND NATURE OF MY PARTICIPATION IN THE LITIGATION:

Plaintiff, Charles Gene Kelone, sole counsel

DATE OR DATES OF TRIAL

June 16, 1989

NAME OF JUDGE BEFORE WHOM CASE WAS TRIED:

Honorable B. C. Bennett, Jr., Judge, Twelfth Judicial District Court, Division "A"

NAME, ADDRESS, AND TELEPHONE NO. OF CO-COUNSEL:

Not applicable.

NAME, ADDRESS, AND TELEPHONE NO. OF COUNSEL FOR EACH OTHER PARTY:

Ronald J. Fiorenza
PROVOSTY, SADLER, & DELAUNAY
P. O. Drawer 1791
Alexandria, Louisiana 71309-1791
(318) 445-3631

SUMMARY OF THE CASE:

Plaintiff filed a workers' compensation suit on June 10, 1986 as a result of injuries sustained on August 18, 1985. Plaintiff's weekly workers' compensation payment was only \$120.00 based on his pre-injury wage as a mechanic. After suit was filed, plaintiff was paid all benefits to which he was entitled under the Louisiana Workers' Compensation law. The suit remained in inactive status until March 14, 1989 when I received a telephone call from defendant's adjuster advising that he wanted to settle

APPENDIX I
CASE #5, PAGE 2

plaintiff's claim. If the claim was not settled, he was going to reduce plaintiff's weekly benefit to \$30.66 based on a job market survey that he had had conducted. On March 16, 1989, defendant reduced plaintiff's workers' compensation benefit to the sum of \$30.66 per week. On March 28, 1989, a Rule to Show Cause why Weekly Workers' Compensation Benefits should not be Reinstated, for Penalties, Interest, and Attorney's Fees was filed. The trial on the Rule was conducted on June 6, 1989. A judgment was rendered in favor of plaintiff compelling defendant to reinstitute weekly workers' compensation benefits to plaintiff at the rate of \$120.00 per week from March 16, 1989. The insurer was cast with the statutory penalty and ordered to pay attorney's fees.

FINAL DISPOSITION OF THE CASE:

As a result of the judgment rendered on the Rule, a settlement conference was initiated with defendant's adjuster and attorney, and an amicable settlement of plaintiff's claim was reached.

APPENDIX I
CASE #6

NAME OF CASE:

Charles W. Pixley, d/b/a, Shelter Mortgage Company vs. Gulfoo
Investment Group, Inc.

TRIAL COURT AND CASE DOCKET NO.

Twelfth Judicial District Court of Louisaina, docket #85-7844-A
Third Circuit Court of Appeal, State of Louisiana, docket #86-1142

CITATION OF CASE IF REPORTED:

Not applicable.

PARTY I REPRESENTED AND NATURE OF MY PARTICIPATION IN THE LITIGATION:

Defendant, Gulfoo Investment Group, Inc., lead counsel

DATE OR DATES OF TRIAL

July 17 and July 18, 1986

NAME OF JUDGE BEFORE WHOM CASE WAS TRIED:

Honorable Edwin L. Lafargue, Judge Ad Hoc, Twelfth Judicial District Court,
Division "A", sitting by appointment of the Louisiana Supreme Court.

NAME, ADDRESS, AND TELEPHONE NO. OF CO-COUNSEL:

Guy Marvin
Vice-President & General Counsel
Independent Life and Accident Company
One Independent Drive
Jacksonville, Florida 32276
(904) 358-5600

NAME, ADDRESS, AND TELEPHONE NO. OF COUNSEL FOR EACH OTHER PARTY:

Stephen M. Irving, lead counsel
645 Napoleon Street
Baton Rouge, Louisiana 70802
(504) 346-8774

Andrew B. Ezell, co-counsel, current address unknown.

APPENDIX I
CASE #6 - PAGE 2

SUMMARY OF THE CASE:

On September 4, 1985, plaintiff filed suit against defendant for breach of contract alleging damages of \$4,784,000.00. Plaintiff was a producer of mortgage loans and pursuant to contract entered into between the parties defendant was to purchase mortgage loans from plaintiff that met certain criteria. On December 10, 1985, defendant filed a Reconventional Demand against plaintiff in the sum of \$24,378.00 for money collected by plaintiff for the benefit of defendant and converted to his own use. Extensive discovery was conducted prior to trial.

FINAL DISPOSITION OF THE CASE:

A two day judge trial resulted in a verdict in favor of defendant rejecting plaintiff's demands at plaintiff's cost and granting judgment on defendant's Reconventional Demand in the sum of \$20,054.70. Plaintiff appealed the district court judgment to the Third Circuit Court of Appeal. Action on plaintiff's appeal was stayed due to his filing of bankruptcy. After the bankruptcy stay was lifted, a nuisance value settlement was paid to plaintiff to end the litigation.

APPENDIX I
CASE #7

NAME OF CASE:

Alvin Jougard, et ux vs. CNA Insurance Company

TRIAL COURT AND CASE DOCKET NO.

Twelfth Judicial District Court of Louisiana, docket #85-8189-B

CITATION OF CASE IF REPORTED:

Not applicable.

PARTY I REPRESENTED AND NATURE OF MY PARTICIPATION IN THE LITIGATION:

Plaintiffs, Alvin Jougard and Bertha Jougard, sole counsel

DATE OR DATES OF TRIAL

January 13, 1986

NAME OF JUDGE BEFORE WHOM CASE WAS TRIED:

Honorable Harold J. Brouillette, Judge, Twelfth Judicial District Court,
Division "B"

NAME, ADDRESS, AND TELEPHONE NO. OF CO-COUNSEL:

Not applicable.

NAME, ADDRESS, AND TELEPHONE NO. OF COUNSEL FOR EACH OTHER PARTY:

Sam N. Poole, Jr.
GOLD, SIMON, WEEMS, BRUSER, SHARP, SUES & RUNDELL
P. O. Box 6118
Alexandria, Louisiana 71307-6118
(318) 445-6471

APPENDIX I

CASE #7, PAGE 2

Employee's parents filed a workers' compensation suit for death benefits arising from the September 5, 1985 death of plaintiffs' twenty-six year old son. The claim was denied by employer's worker's compensation insurer forcing me to file suit on November 12, 1985. Rather extensive fact and medical discovery had to be conducted by deposition in what appeared to me to be a rather routine worker's compensation claim. The employer's insurer, CNA Insurance Company, continued to deny coverage up until the actual morning of trial when defendant offered to pay the statutory maximum per parent survivor's benefit and the statutory maximum funeral benefit. Based on my advice, my clients elected not to accept the defendant's offer and the case was tried.

FINAL DISPOSITION OF THE CASE:

Judgment was rendered in favor of plaintiffs for the statutory maximum death benefit for each parent, the statutory maximum funeral benefit, medical expenses incurred in the treatment of the deceased prior to his death, statutory penalties of twelve percent on the foregoing and attorney's fees.

APPENDIX I
CASE #8

NAME OF CASE:

State of Louisiana vs. Glenn Dauzat

TRIAL COURT AND CASE DOCKET NO.

Twelfth Judicial District Court of Louisiana, Criminal Docket #42,521
Supreme Court of Louisiana, Docket #67,002
Supreme Court of Louisiana, Docket #80-0-2999

CITATION OF CASE IF REPORTED:

380 So. 2d 1376 (1980)
382 So. 2d 966 (1980)

PARTY I REPRESENTED AND NATURE OF MY PARTICIPATION IN THE LITIGATION:

Defendant, Glenn Dauzat, co-counsel

DATE OR DATES OF TRIAL

Numerous appearances including Pre-Trial and Post Trial Motions and an appearance in the Louisiana Supreme Court. Jury trial conducted June 25 and 26, 1980.

NAME OF JUDGE BEFORE WHOM CASE WAS TRIED:

Honorable James N. Lee, Judge, Twelfth Judicial District Court, Division ...

NAME, ADDRESS, AND TELEPHONE NO. OF CO-COUNSEL:

Donald R. Wilson
GAHARAN & WILSON
P. O. Box 1356
Jena, Louisiana 71342
(318) 992-2104

NAME, ADDRESS, AND TELEPHONE NO. OF COUNSEL FOR EACH OTHER PARTY:

Honorable Eddie Knoll, District Attorney
P. O. Box 426
Marksville, Louisiana 71351
(318) 253-6587

Assistant District Attorney Cliff E. Laborde, III
Laborde & Neuner
P. O. Drawer 52828
Lafayette, Louisiana 70505-2828
(318) 237-7000

APPENDIX I
CASE #8 - PAGE 2

SUMMARY OF THE CASE:

Defendant was charged with four counts of "Simple Criminal Damage to Property." The property that my client was accused of damaging consisted of tractors, combines, welding machines, various farm equipment attachments, and a four-wheel drive pick-up. The damage to the equipment, which exceeded \$80,000.00, was done by ramming and driving certain of the equipment into other equipment. There were four separate and distinct piles of equipment located in a field, thus the four different counts for which my client was indicted by the Grand Jury. Numerous pre-trial and post-trial motions were filed including a Writ of Certiorari, which was initially granted by the Louisiana Supreme Court, but was later dismissed. The writ was based on the exclusion of blacks in the selection of the Grand Jury.

FINAL DISPOSITION OF THE CASE:

The trial on the merits was conducted on June 25 and 26, 1980, resulting in a jury verdict of "Guilty" on two of the four counts and "Not Guilty" on the other two counts. Subsequent to defendant's conviction, he was charged with attempting to jump bail. An appeal of the jury verdict was filed with the Louisiana Supreme Court. Based on a plea bargain with the District Attorney on the attempt to jump bail, defendant served a six month sentence concurrently with the two eighteen month consecutive sentences he was ordered to serve on the counts for which he had been convicted. Defendant's appeal was dismissed.

APPENDIX I
CASE #9

NAME OF CASE:

Elaine Dozier Redmon Vs. Fireman's Fund American Life Insurance Company

TRIAL COURT AND CASE DOCKET NO.

Twelfth Judicial District Court of Louisiana, docket #37,656

CITATION OF CASE IF REPORTED:

Not applicable.

PARTY I REPRESENTED AND NATURE OF MY PARTICIPATION IN THE LITIGATION:

Plaintiff, Elaine Dozier Redmon, sole counsel

DATE OR DATES OF TRIAL

August 29, 1978

NAME OF JUDGE BEFORE WHOM CASE WAS TRIED:

Honorable Earl Edwards, Judge, Twelfth Judicial District Court

NAME, ADDRESS, AND TELEPHONE NO. OF CO-COUNSEL:

Not applicable.

NAME, ADDRESS, AND TELEPHONE NO. OF COUNSEL FOR EACH OTHER PARTY:

James A. Bolen, Jr.
BOLEN, ERWIN, JOHNSON & COLEMAN, LTD.
P. O. Box 906
Alexandria, Louisiana 71309-0906
(318) 445-8236

SUMMARY OF THE CASE:

Plaintiff filed suit to recover benefits due under a life insurance policy as a result of the death of plaintiff's husband by gunshot. The issue before the court was whether the shooting was accidental or suicide. The Avoyelles Parish Coroner and the Avoyelles Parish Sheriff's Department had ruled plaintiff's husband's death a suicide and there was strong circumstantial evidence to indicate suicide, but no suicide note was found. Defendant denied the claim and suit was filed on March 7, 1978.

APPENDIX I
CASE #9 - PAGE 2

FINAL DISPOSITION OF THE CASE:

The matter was tried on July 24, 1978. Written Reasons were handed down on August 29, 1978, and judgment signed that day. Judgment was rendered in favor of plaintiff and against defendant for the full amount of the policy of insurance or the sum of \$15,000.00 with legal interest from date of judicial demand and for all costs.

APPENDIX I
CASE #10

NAME OF CASE:

Phyllis Prevot vs. Nelson Williams, Jr.

TRIAL COURT AND CASE DOCKET NO.

Twelfth Judicial District Court of Louisiana, docket #31,880
Third Circuit Court of Appeal, State of Louisiana, docket #4804

CITATION OF CASE IF REPORTED:

306 So.2d 377 (La. App. 3 Cir. 1975)

PARTY I REPRESENTED AND NATURE OF MY PARTICIPATION IN THE LITIGATION:

Plaintiff, Phyllis Prevot, sole counsel

DATE OR DATES OF TRIAL

Numerous appearances including Pre-Trial Motions, Exceptions, Post Trial Motions and Appeal. Trial conducted March 15, 1974, Appeal argued December 2, 1974.

NAME OF JUDGE BEFORE WHOM CASE WAS TRIED:

Honorable Earl Edwards, Judge, Twelfth Judicial District Court

NAME, ADDRESS, AND TELEPHONE NO. OF CO-COUNSEL:

Not applicable.

NAME, ADDRESS, AND TELEPHONE NO. OF COUNSEL FOR EACH OTHER PARTY:

Richard V. Burns
P. O. Box 650
Alexandria, Louisiana 71309-0650
(318) 442-4300

APPENDIX I
CASE #10, PAGE 2

SUMMARY OF THE CASE:

Plaintiff filed a suit for legal separation on July 3, 1972. Defendant subsequently filed a second suit for divorce based on the grounds of adultery. On January 9, 1973, defendant filed an answer to plaintiff's original petition for separation and a reconventional demand for divorce based on the grounds of adultery. On November 6, 1973, trial was set for December 11, 1973. Plaintiff was represented by attorney Maxwell Bordelon at the time of the institution of her suit for separation. On November 20, 1973, Mr. Bordelon filed a Motion withdrawing as counsel of record for plaintiff. No notice of Mr. Bordelon's withdrawal as counsel of record was sent to plaintiff because Mr. Bordelon did not have the Houston address where plaintiff was residing. On December 11, 1973, the case was called for trial. Plaintiff made no appearance at the trial. Defendant, represented by counsel, presented his case on the Reconventional Demand and the Court granted a divorce to defendant on the grounds of adultery and awarded custody of the parties' three minor children to defendant, subject to reasonable visitation privileges in favor of plaintiff.

In December 1973, plaintiff who was residing in Houston, Texas, had consulted a Texas attorney concerning the possibility of having her case transferred from Louisiana to Texas for her convenience. On December 10, 1973, the Texas attorney attempted to contact Mr. Bordelon to inquire as to the status of plaintiff's case and to notify him that plaintiff was then in the hospital and would not be able to attend the trial that was set for the next day. Mr. Bordelon could not be reached and did not return the Texas attorney's telephone call until December 12, 1973. On December 14, 1973, I was contacted by plaintiff's mother and retained by her later that day. I was informed that plaintiff had been unable to attend the trial on December 11, 1973 because of her hospitalization following an accident in Houston. Based upon the information I received from plaintiff's mother and from Mr. Bordelon, an application for a new trial was filed on December 14, 1973. A hearing was held on the application on December 28, 1973, and a judgment granting a new trial was signed on January 8, 1974.

FINAL DISPOSITION OF THE CASE:

The trial on the merits was held on March 15, 1974, after which a divorce was granted in favor of defendant based on the adultery of plaintiff and the custody of the three minor children was granted to plaintiff. The judgment was signed on March 22, 1974. Defendant filed an application for a new trial on March 27, 1974 which was heard and denied on April 2, 1974. Defendant filed an appeal with the Third Circuit Court of Appeal for the State of Louisiana. The appeal was argued on December 2, 1974. The judgment of the trial court was affirmed at defendant's cost.

APPENDIX II
CASE #1

NAME OF CASE:

Cliff G. Stinson, et al vs. Chevron U.S.A., Inc., et al

COURT AND CASE DOCKET NO.:

United States District Court, Western District of Louisiana
Lafayette-Opelousas Division
Civil Action #84-1910-0

PERIOD OF REPRESENTATION:

March 22, 1984 to October 7, 1985

PARTY I REPRESENTED AND NATURE OF MY PARTICIPATION IN THE LITIGATION:

Cliff G. Stinson, Dorothy May Slocum Stinson, Gwendolyn Stinson Coutee,
Steve Stinson and Rebecca Stinson, lead counsel

NAME, ADDRESS AND TELEPHONE NUMBER OF CO-COUNSEL:

Carol J. Aymond, Jr.
235 Southwest Main Street
Bunkie, LA 71322
(318) 346-6613

NAME, ADDRESS AND TELEPHONE NUMBER OF COUNSEL FOR EACH OTHER MAJOR PARTY:

Michael W. Adley
Juneau, Judice, Hill & Adley
P.O. Drawer 5769
Lafayette, LA 70505-1769
(318) 235-2405
Attorney for Dixie Lynn Field Drilling Company, Inc.

Alan K. Breaud
Roy, Carmouche, Bivins, Judice, Henke & Breaud
P.O. Drawer 2
Lafayette, LA 70502
(318) 233-7430
Attorney for Transit Casualty Insurance Company

SUMMARY OF THE CASE:

This seaman's case arose as a result of an injury that occurred while plaintiff, Cliff E. Stinson, was being transported from a drilling platform on which he had been working to a crew boat. The case was settled in two stages. A total settlement of \$865,000.00 was reached in the case, \$665,000.00 being paid by Dixie Lynn Field Drilling Company, Inc. and \$200,000.00 being paid by Transit Casualty Insurance Company with \$50,000.00 being repaid to Dixie Lynn Field Drilling pursuant to a "Mary Carter" Agreement.

CHARLES A. VANIK
 11 PENNSYLVANIA AVENUE, N.W.
 WASHINGTON, D.C. 20004

Honorable Biden, Chairman
 Senate Committee on the
 Judiciary
 S.D.O.B.

1-24-94

Washington, D.C. 20510-6275

Dear Mr. Chairman:-

On Thursday morning, Jan 27, 1994,
 Sen Howard Metzenbaum will present my
 good friend, Judge Leslie Brooks Wells
 who has been nominated to the Federal
 District Court in Cleveland.

I have known Judge Wells
 for over twenty-five years as a well
 trained lawyer and as a highly respected
 judge of the Common Pleas Court of Cuyahoga
 County, Ohio. I am pleased to support
 her appointment. Judge Wells will reflect
 great credit on the Federal Bench.

It is my hope to be present
 for this important hearing.

Sincerely -

Charles A. Vanik

February 4, 1994

STATEMENT OF LAURACK D. BRAYOPPOSING THE CONFIRMATION
OF JUDITH ROGERS

I am writing to express my opposition to the confirmation of Judith Rogers as a federal appeals judge.

I am an African American lawyer practicing in the District of Columbia. The position I take against the confirmation of Judge Rogers is based on my experience and knowledge as an appellate litigator in the District of Columbia (D.C.) Court of Appeals and on my observations of cases regarding other independent African American lawyers litigated in the Court of Appeals and the Court's treatment of those cases. More specifically, my position evolves from the facts and circumstances surrounding three cases (two civil and one criminal) I litigated on behalf of African American clients in the D.C. Court of Appeals, which caused me to become intimately involved in the appellate process and with the Court's appellate conduct and behavior. Two of the cases were quite complex and involved significant records and expert witnesses.

I believe that Judge Rogers is unable or lack the desire to treat poor African American litigants, including children, represented by independent African American lawyers in a fair, just, and impartial (or non-discriminatory) manner.

I also question her character as it pertains to her supervision and knowledge of fraudulent practices by D.C. Court of Appeals personnel, and her refusal to take actions to discourage or condemn such conduct. Further, I question her character as it pertains to her supervision and knowledge of conduct or practice which bespeaks of obstruction of justice, and her refusal to demonstrate that steps are being taken to prevent such conduct, which in at least one instance could mean (and could have meant) saving lives of District citizens.

One significant example of the discriminatory conduct of the D.C. Court of Appeals under the leadership of Judge Rogers is a wrongful death-medical malpractice case involving eight (8) African American children as plaintiffs (including one child who was born only hours before her mother was killed--there was evidence not only of gross negligence, but also of brutality, i.e., beating, surrounding the death--and the mother never got to hold the child before she was killed)(Alice Sheffield, et. al. v. District of Columbia, et. al., unpublished), whereby the D.C. Court of Appeals affirmed a directed verdict (denied a jury decision) in view of admissions by hospital doctors that the mother's death was at least negligently caused by an overdose of morphine administered by hospital personnel, and other evidence; there also was a suppression of evidence of multiple deaths (probably of African Americans) on the Obstetrics and Gynecology ward

of the D.C. General Hospital linked to the use of the drug Stadol on patients, which likely resulted in more deaths, and evidence that Stadol was a new drug and that the hospital experimented on Onita Sheffield's (the deceased) body with the drug without her consent.

Onita Sheffield entered D.C. General Hospital in good health and solely for the purpose of giving birth. She left dead with brain damage. We argued and proved that the trial judge's directed verdict was intentional, deliberate, and invidious.

In Colbert v. Georgetown University, 623 A.2d 1244 (D.C. 1993), Judge Rogers, as a member of the panel, held that admissions of negligence by a doctor to a family member is prima facie evidence of medical malpractice and the issue must be submitted to the jury. In Sheffield, there was admissions by a doctor to family members, but the D.C. Court of Appeals did not so hold (and even though Judge Rogers was not a panel member, she could have, sua sponte, called for a hearing by the full court if she felt an injustice had been done and if she felt that the holding she made in Colbert should have been made in Sheffield). The important question is why didn't the Court of Appeals so hold? In the Colbert case, the plaintiff's attorney was white; in the Sheffield case, the plaintiff's attorney was black. Was race a factor? Based on my experience and knowledge in and of the D.C. Court of Appeals, I believe it was.

I continue to hope and believe, on behalf of Mrs. Alice Sheffield and the Sheffield children, and myself, that justice will be done, and that we all shall receive relief. We have continued to keep Onita Sheffield's estate open.

Respectfully submitted,

Laurack D. Bray, Esq.
Laurack D. Bray, Esq.

P.S. Enclosed are copies of two civil rights complaints filed in the D.C. Federal courts on behalf of the Sheffields and Sceva Kendall (a criminal matter). None of the plaintiffs, the Sheffields or Kendall, were granted hearings on the Complaints. Therefore, there were no determinations as to the merits of the allegations made. The federal judge granted the judges judicial immunity against claims of racial discrimination, so the judges never answered the charges or allegations.

The question for the Senate, as to Judge Rogers' confirmation, is: if the allegations are true, and I contend that they are, should Judge Rogers be confirmed?

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALICE SHEFFIELD

Individually and as Personal Representative
on Behalf of the Estate of Onita Sheffield,
Deceased and on Behalf of Angel May Sheffield,
Tameca Shawntee Sheffield, Onita Sheffield,
Star Angel Sheffield, James L. Nicks, Lafayette
Sheffield, Daniel Thompson Sheffield, and Tony
Sheffield, Children of the Deceased and Real
Parties in Interest

Plaintiffs,

Serve at: 1118 Eight Street, N.E.
Washington, D.C. 20002

v.

HENRY F. GREENE

Individually and as Judge of the Superior
Court of the District of Columbia

Serve at: District of Columbia Courthouse
500 Indiana Avenue, NW Rm
Washington, D.C. 20001

and

JAMES BELSON, JOHN FERRELL, and ANNICE WAGNER

Individually and as Judges of the District
of Columbia Court of Appeals

Serve at: District of Columbia Courthouse
District of Columbia Court of
Appeals 6th Floor
500 Indiana Avenue, NW
Washington, D.C. 20001

CA NO. 91-2545.
(NHJ)

and)

DISTRICT OF COLUMBIA)

As a municipality and Party-Defendant in the)
underlining or primary lawsuit (in the Superior)
Court of the District of Columbia))

SERVE AT: Mayor Sharon Pratt Dixon)
District Building)
1300 Pennsylvania Avenue, NW)
Washington, D.C. 20001)

Defendants.)

COMPLAINT

DECLARATORY JUDGMENT AND OTHER RELIEF AND INJUNCTIVE RELIEF

Jurisdiction

1. Jurisdiction of this Court is invoked under or pursuant to 28 U.S.C. secs 1331, 1343, 2201 and 2202; 42 U.S.C. secs. 1981, 1983, 1985, and 1988; and the United States Constitution, Fifth Amendment and Seventh Amendment.

Parties

1. The parties are as identified in the above-captioned title as Plaintiffs and Defendants.

Brief Statement of the Facts

Plaintiffs allege that a brief statement of the pertinent facts for a proper understanding of this case is as follows:

1. This case involves the wrongful death of a 32-year old poor, African-American or Black, female, inmate-patient who died on the ward of D.C. (District of Columbia) General Hospital only hours after giving birth to a healthy baby girl.

2. As a result of the deceased's death and events surrounding the death, Alice Sheffield (mother of the deceased), on her own behalf and on behalf of the deceased's estate and the deceased's children, filed suit in the Superior Court of the District of Columbia charging the District of Columbia (hereinafter "District") and several of its officers and employees with multiple claims or acts of legal misconduct involving constitutional, federal, and local law and charging them under both wrongful death and survival act statutes.

3. Before trial, the District defaulted: (1) by filing untimely Answers to Plaintiffs' Complaint; (2) by filing untimely Responses to Plaintiffs' discovery requests; and (3) by filing incomplete and evasive discovery responses after it finally responded to Plaintiffs' discovery requests (after being granted four(4) extensions of time within which to file discovery responses). Plaintiffs, on at least two occasions, moved for a default judgment against the District (to include its officers), but the trial judge denied the motions.

4. At trial, after the trial judge had previously disposed of several claims, there remained 16 Counts, that is: Count I

(wrongful death-based on multiple actions); Count II (medical malpractice-based on an overdose morphine injection); Count III (negligence-based on the deceased's fall from her hospital bed to the floor); Count IV (assault and battery-based on physical acts perpetrated against the deceased, including hitting and/or kicking and shackling or handcuffing her extremities to the hospital bed); Count V (42 U.S.C. sec. 1983 claim-charging deprivation of substantive due process, e.g., liberty and others related to the handcuffs); Count VII (intentional infliction of emotional distress-based on the correctional officer watching the deceased suffer and doing nothing to help her); Count IX (negligence-by hospital personnel regarding handcuffs); Count XI (negligent training-D.C. Department of Corrections-correction officer); Count XII (negligent training-D.C. General Hospital-hospital personnel); Count XIII (medical malpractice-negligent administration of the drug Stadol and battery for administering it without the deceased's consent); Count XIV (intentional spoliation of evidence-the deceased's medical records directed towards the overdose morphine injection); Count XV (cruel and unusual punishment-based on a failure, on the part of the correction officer, to respond to the deceased's serious medical need); Count XVI (fraudulent concealment-based on the Defendants' concealment of the deceased's medical records); Count XVIII (42 U.S.C. sec. 1985-conspiracy to cover-up evidence); Count XXI (deprivation of liberty interest in the family unit based on the deceased's death); and Count XXII (loss of life-pursuant to 42 U.S.C. 1983- a survival claim based on federal law). Except when otherwise precluded by the trial judge, Plaintiffs

produced substantial evidence (for several Counts, more than substantial evidence) to support each Count.

5. Plaintiffs' (to include the decedent) entire litigation team (with the exception of two individuals) consisted of African-Americans, that is, the decedent, the Plaintiffs (deceased's mother and children), Plaintiff's counsel, Plaintiff's expert witnesses and their lay witnesses. Plaintiffs' counsel was(is) a sole practitioner and litigated the entire case himself (i.e., not connected with a white law firm or another (white) lawyer). Plaintiffs offered the testimony of six lay witnesses (and one other witness's testimony was not admitted--albeit erroneously, Plaintiffs contend) and five expert witnesses (one out-of-state medical/health expert who came from California and testified as to consent and informed consent)(and including three adverse expert witnesses, including the District's medical examiner).

6. After Plaintiff's case-in-chief, the trial judge, sua sponte (or voluntarily), moved for a directed verdict (as the District was prepared to put on its case-in-chief and did not make a formal motion or request for a directed verdict) and entertained Plaintiffs' opposition to the motion as to each remaining Count.

7. After completion of Plaintiffs' oral opposition to the directed verdict, the trial judge directed a verdict as to all remaining Counts at trial. Thereafter, Plaintiffs noted a timely appeal.

8. At several points throughout the above-mentioned litigation, Plaintiffs, through counsel, charged the trial judge with bias, prejudice, and invidious discrimination, based on his conduct during pre-trial and trial, and indeed, at one point had moved for his

recusal (through a motion, and, subsequently--after the motion was denied, through a Writ of Mandamus) based on his three-year extra-judicial relationship with defense counsel and on his suggesting motions for defense counsel to file (and his, thereafter, granting the same said motions).

Count I.

42 U.S.C. SEC. 1983 AND DEPRIVATION OF PLAINTIFFS' SEVENTH AMENDMENT CONSTITUTIONAL RIGHT TO A TRIAL BY JURY.

1. Plaintiffs allege that Defendant Judge Henry F. Greene of the Superior Court of the District of Columbia, under color of District of Columbia law (as a judicial officer of the District of Columbia Superior Court), deprived Plaintiffs herein of their Seventh Amendment constitutional right to a trial by jury by improperly and with ill will directing a verdict in favor of Defendant District of Columbia in the case of Alice Sheffield v. District of Columbia, et. al., CA NO. 9799-87. Specific evidence of the malice is: (1) Judge Greene himself initiated and made the motion for a directed verdict and not the District of Columbia (hereinafter "District"); the District, through its counsel, never made a motion for a directed verdict, was prepared to put on its case-in-chief, and placed the directed verdict decision in Judge Greene's hands; (2) Judge Greene developed animosity and hostility towards Plaintiffs and their counsel (particularly their counsel) for not retaining an independent medical doctor (with Plaintiffs choosing instead to rely on and/or utilize the District's medical doctor, i.e., the medical examiner, pursuant to District of Columbia case law--because the Plaintiffs found and/or determined that an independent doctor was not necessary under the

circumstances of the particular case in question). At various times during the litigation Judge Greene continued to comment that things would have been a lot easier if Plaintiff had brought in an independent physician. Further, he forecast that Plaintiffs would not prevail on their wrongful death and medical malpractice claims before Plaintiffs had presented most of their evidence supporting those claims (i.e., a foregone conclusion); (3) Judge Greene made an intentional false statement on the record (stating that he was not aware of a controlling case--or, more specifically, that it was the first time that he had seen the case--when in actuality he had seen and referred to the case in another, and concurrent, medical malpractice trial (approximately one month prior thereto)), and assumed a false and fabricated argument or position in an attempt to preclude the Plaintiffs from utilizing the District's medical expert at trial. It was only because Plaintiff's counsel came to trial prepared with a memorandum of law that Defendant Greene eventually conceded and Plaintiffs were allowed to use the expert. (4) Defendant Greene himself concluded on the record that an overdose of morphine was a cause of death, and that the only remaining issue related to the morphine cause of death was how the deceased received the morphine injection (i.e., who gave her the morphine injection), which was clearly a jury question (assuming, for the sake of argument, that at that point it had not been proven who gave the deceased the morphine--Plaintiffs believe it had been (hospital personnel)). (5) In at least one other wrongful death case involving a poor, Black family (litigated at or about the same time as the herein case in question--Sheffield v. D.C.), Defendant Greene denied the family a

trial by jury (by dismissing the case with prejudice before trial, based on a discovery problem).

Evidence of a planned directed verdict by Judge Greene is that he requested and received a U.S. Marshal to be present in the courtroom during this civil medical malpractice/wrongful death proceeding (which is an extraordinary move), anticipating that the Plaintiffs and/or their counsel would react with outrage, or otherwise inappropriately (or, rather, appropriately under the circumstances of the case) to his directed verdict, and believing that he would need someone, perhaps, to control their behavior.

2. Plaintiffs allege further that Defendant Greene's reasons given for the directed verdict in favor of the District in the Sheffield case were either erroneous or immaterial based on District of Columbia (or other) law, the facts, and the evidence.

3. Plaintiffs allege that they presented sufficient evidence for each Count of their Complaint and/or Amended or Second Amended Complaint to support a verdict in their favor (or, alternatively, to overcome a directed verdict for the Defendants); indeed, for several Counts Plaintiffs presented overwhelming evidence (including circumstantial evidence and reasonable inferences), sufficient to not only present a prima facie case, but also to prove their case by a preponderance of the evidence.

For example, as to Count II of the Second Amended Complaint (hereinafter references to "Counts" will refer to the Second Amended Complaint)(charging the District with negligently killing or otherwise causing the death of the deceased by injecting her with an overdose of morphine), Plaintiffs produced at least the following admitted evidence at trial: (1) an admission by the District's own

medical doctor (in the medical examiner's office) that D.C. General Hospital personnel had given the deceased the overdose of morphine and that the high level of morphine caused the deceased's death; (2) the District's own autopsy report (produced by its medical examiner and toxicologist) showing a high level of morphine in the deceased's system at the time of her death and showing that the deceased suffered brain damage before she died, (3) testimony of the District's medical examiner stating that the deceased died, at least, of an overdose of morphine, and that the hospital could have caused her death (she testified as to standard of care, i.e., normal dose; breach of the standard, i.e., too high a level; and causation, i.e., the high level of morphine caused the deceased death--at least one cause), (4) testimony of two witnesses to the aforementioned medical doctor's admission of the District's hospital personnel's responsibility for the deceased's death due to the overdose of morphine, (5) testimony of another witness who witnessed another District doctor state (and admit) that, "that would not have happened (the deceased's death) if you hadn't given her (the deceased) the wrong medicine (morphine)"--this witness was hospitalized on the same ward and at or about the same time as the deceased at the time of the deceased's death; (6) evidence that the deceased was in good health after giving birth (and the baby was--and is--in good health as well--indicating that the overdose of morphine was given to the deceased after she gave birth); (7) evidence that the deceased was under constant surveillance at all times (by a correction officer) while on the ward of D.C. General Hospital; (8) evidence that the hospital personnel were required to detoxify the deceased after she entered the hospital (which would have detected any contraindicated

drugs in her system, i.e., morphine), but the hospital did not detoxify her. (9) Evidence that District hospital personnel intentionally destroyed crucial medical records that would have provided direct evidence that the hospital personnel injected the deceased with an overdose of morphine (i.e., an inference could be drawn that the destroyed medical records contained specific information showing that an injection of morphine was prescribed or ordered and showing who injected the deceased with the morphine); (10) evidence that after the hospital personnel discovered or realized that the deceased had been given an overdose of morphine, they failed to give the deceased an antidote that could have prevented her death; and other testimonial and demonstrative evidence that went to the morphine injection that Defendant Greene did not admit, but which Plaintiffs believe should have been admitted.

Another example is Count XIII (the battery medical malpractice Count related to the injection of the drug "Stadol"). Plaintiff produced at least the following admitted evidence: (1) hospital medical record (Physician's Order Sheet) showing that the drug Stadol was ordered for the deceased by a District doctor; (2) medical record (Nurses' Progress Notes) showing that the drug Stadol was administered to the deceased; (3) testimony of Plaintiffs' qualified expert on consent and informed consent (Ms. Dianne Jackson), based on her review of the deceased's medical records and her expertise on consent, that the deceased did not consent to the administration of the drug Stadol; (4) evidence that morphine and Stadol have similar qualities and effects and are contraindicated for each other (or for use with each other) and that Stadol is 8 times stronger than morphine; (5) evidence that both Stadol and morphine were in the deceased's body at the same

time through action of the District's employees; (6) direct evidence that an overdose morphine injection was a cause of death and powerful circumstantial evidence that Stadol was a cause of death; (7) evidence that Stadol was explicitly not recommended for use with or for the deceased (PDR - "Physician's Desk Reference"); (8) the deceased suffered the type of risks that the use of Stadol could cause (i.e., respiratory depression); (9) evidence (PDR) that at the time of the Stadol injection into the deceased, the manufacturer itself did not know its exact mechanism (i.e., how it acted on the body or its system--although the manufacturer did know "some" of its effects); (10) evidence (testimony by the District's medical examiner--Dr. Silvia Comparini) that there had already been several Stadol-related or caused deaths on the ward of D.C. General Hospital at the time of the herein deceased's death; (11) evidence (admission by the District's medical doctor--Dr. Philip Santiago) that the District was experimenting on the herein deceased to determine what effect the Stadol would have on her body (because such said effects were widely unknown); (12) evidence that the deceased suffered brain damage before her death due to a lack of oxygen (which was caused by the morphine and Stadol injections); and (13) evidence that D.C. General Hospital was required to detoxify the deceased after she entered the hospital to ascertain if she had any contraindicated drugs (e.g., morphine) in her body when she entered, but that the hospital failed to so detoxify her.

A final example is Count XV, the Eight Amendment cruel and unusual punishment Count. As to this Count, Plaintiffs presented at least the following admitted evidence: (1) medical records, et.

seq., showing that the deceased had recently given birth to a baby girl and was in post-partum recovery when the acts or conduct to follow was established; (1a) admission by District's police officer that the deceased was diagnosed as dying from hemorrhaging--indicating that there were blood and blood clots from the deceased present (i.e., deceased wallowing in blood); (1b) admission by a District doctor (Dr. Conrad Duncan) that the deceased was lying on the floor (in the hospital room) with her single extremity (left leg) shackled to the hospital bed when he entered the hospital room after being summoned by a nurse to respond to the deceased's suffering, and that at the same time, the female correction officer was present and sitting on a chair watching and doing nothing to assist the deceased; and that hospital staff had to order the correction officer to remove the shackles from the deceased's leg; (2) admission (medical record) showing that the District's nurse observed the deceased complaining of shortness of breath and requesting medicine for pain; observed that the deceased left leg was handcuffed to the hospital bed while deceased was sitting on the bed and later that the deceased was sitting on the "floor" (she had apparently fallen) and her single extremity "remain(ed) cuffed"; observed that the guard (correction officer) was present; observed that the deceased was perspiring "profusely" and that the deceased was exhibiting white mucous foam from her mouth and thrashing about on the bed and on the floor; and observed a Code Blue being called; (3) admission (medical record) by a different nurse showing decedent was perspiring profusely and complaining of shortness of breath; (4) a D.C. correction officer's log sheet showing that deceased was shackled and that she was vomiting; (5) testimony by Plaintiffs'

qualified expert (Ms. Dianne Jackson) that the use of metal handcuffs on inmate-patients is inhumane treatment; (6) testimony by the District's own penological expert (Mr. Hallem Williams) (Plaintiffs' adverse expert witness) that a correction officer is required to take steps to seek medical assistance for an inmate in emergency situations; (7) testimony by the District's own hospital administrator (Mr. John Dandridge, Jr.) (Plaintiffs' adverse expert witness) that the hospital (D.C. General Hospital) never uses metal restraints on patients as a means of proper patient care; (8) evidence (medical records and log sheet) that the correction officer observed the deceased suffer and never sought medical help or assistance for her or attempted to help the deceased herself for at least 1½ hours; (9) evidence (testimony of Plaintiffs' nurse-lawyer expert--Ms. Pamela Copeland) that the deceased was suffering from "severe respiratory distress" (during the time the correction officer was sitting and watching her suffer); (10) some evidence that the deceased was battered physically by the correction officer; (11) evidence (testimony) that District personnel (medical examiner's office) would not allow the Sheffield family to view the body before the autopsy--not even for purposes of identifying the body--the personnel simply showed the family two polaroid-type pictures of the head of the deceased (where the family might have discovered abuse or damage to the body); and (12) evidence (autopsy report) that the deceased suffered brain damage before her death and died as a result of a lack of oxygen.

4. Plaintiffs allege that they produced five (5) expert witnesses whom all produced significant testimony that supported Plaintiffs' case and imposed liability on Defendants. Included

among the experts were a medical doctor, a penologist, a nurse-lawyer, and a health consultant. The medical doctor (Dr. Comparrini), at least, testified that the standard of care for a morphine injection was a "regular" dose, that as to the herein deceased the standard of care was breached because the level of morphine found in the deceased's blood was "too high", and that the overdose of morphine, at least, caused the deceased's death. The penologist (Mr. Williams) testified that the standard of care for action by a correction officer in an emergency situation on the hospital ward while guarding an inmate-patient was to seek medical assistance for an inmate-patient, and it was shown that the standard of care was breached by a demonstration that the correction officer took no steps to aid the deceased herself or to seek aid, and that nonaction necessarily contributed to and caused the deceased's death due to a lack of oxygen (effects of the morphine and Stadol), and it also aggravated her existing condition at the time. The nurse-lawyer (Ms. Copeland) testified that the nursing personnel violated the standard of care for responding to the deceased's severe respiratory distress by not providing proper care for the deceased during her state of distress (such as by not taking vital signs timely, by not timely securing a more senior physician, and by not recognizing the symptoms of the deceased's distressed state). The health/medical consultant (Ms. Jackson) testified to the standard of care regarding obtaining consent (and informed consent) from a patient for the administration of certain drugs. Ms. Jackson testified that the standard of care of consent to the administration of the drug Stadol was "specific" consent by the deceased for the administration of the drug, that D.C. General's personnel violated the standard of care by not ob-

taining such "specific" consent (and therefore no consent). Plaintiffs (alleging battery medical malpractice as to the Stadol) proved, in addition to the lack of consent, that the deceased was given a 2mg intramuscular dose of the drug Stadol (through medical records, i.e., physician's order sheet, nurses' progress notes), that both Stadol and morphine were in the deceased's body at the same time, that Stadol and morphine have the same qualities and effects, that Stadol is 8 times stronger than morphine, and that morphine definitely was a cause of death, and that, therefore, Stadol had to, at least, contribute to the deceased's death (especially when the two drugs are contraindicated for use with each other).

5. Plaintiffs allege further that Defendant Greene "acted out of personal motivation and. . . used his judicial office as an offensive weapon to vindicate personal objectives," that is, to deny Plaintiffs (particularly because they are poor and black) a money judgment and to deny Plaintiffs' black counsel (particularly because he was a sole practitioner and black) attorney fees. Plaintiffs allege that in least one other wrongful death case involving poor African-American children (or the death of such said children), Defendant Greene has alleged, through adopting the government's position, that the only person interested in pursuing the wrongful death claims was the attorney in the case (insinuating that no one else cares about the death of the children or about the liability for their death--even though the father, albeit incarcerated, continued to express an interest in the children's deaths and an interest in determining liability for their deaths) and insinuating that his only interest in the case was attorney fees.

Evidence that Judge Greene adhered to the same or a similar philosophy in the underlining herein case of Sheffield v. District of Columbia, et. al., CA NO. 9799-97 (hereinafter "Sheffield") is that at one point before delivering the directed verdict, Judge Greene stated to counsel, "the bottom line Mr. Bray, is that you are not going to get to the jury on any of your Counts." The Counts or claims were not Mr. Bray's (or counsel's), rather the claims were the Plaintiffs, yet Defendant Greene directed his statement to counsel as if counsel was bringing the suit (to collect attorney fees); and Defendant Greene was letting counsel know that he (counsel) was not going to collect any fees, while at the same time totally disregarding the rights of the real parties (Mrs. Sheffield and the children). Again, the same philosophy was adhered to here by Defendant Greene as was in the aforementioned case, that is, only Plaintiff's counsel was interested in pursuing the litigation and not the family (even though at one point in the trial, the court had to call a recess because Mrs. Sheffield broke down in tears over certain testimony concerning her deceased daughter).

6. Plaintiffs' allege further that the District itself did not move for a directed verdict in the trial court, rather, Defendant Greene, sua sponte, moved for and directed the verdict. Again, the District's counsel was prepared to and intended to put on his case-in-chief.

7. Plaintiffs allege further that they were deprived of a trial by jury because the jury (in Sheffield) did not make the decision (as to factual determinations, rights, liabilities, damages, or other).

7a. Plaintiffs allege that they have been and continue to

be injured by the denial of a trial by jury as guaranteed them by the Seventh Amendment of the United States Constitution, and as long as the right is denied, they will continue to suffer injury.

8. Plaintiffs allege that Defendants Judges James Belson, John Ferren, and Annice Wagner, under color of District of Columbia law (as judicial officers of the District of Columbia Court of Appeals), by knowingly and willingly affirming Defendant Greene's improper directed verdict, in full view of the overwhelming evidence supporting Plaintiffs' case and the remaining points of reversible error (e.g., the trial court relying on an erroneous legal standard to support its decision), deprived the Plaintiffs-appellants of their constitutional right to a trial by jury.

Count II

42 U.S.C. SEC. 1983 AND DEPRIVATION OF PLAINTIFFS' STATUTORY RIGHT TO EQUAL TREATMENT (42 U.S.C. SEC. 1981).

1. Plaintiffs herein incorporate by reference all allegations set forth in Count I as if said allegations were set forth herein.

2. Plaintiffs allege further that Defendant Greene acted under color of District of Columbia law in depriving them of their Federal statutory right, pursuant to 42 U.S.C. sec. 1981, of equal treatment (to that of white people) in obtaining and contracting for a jury trial and giving evidence pursuant thereto.

2a. Plaintiffs allege that they are African-American (or black) and Defendant Greene is white.

2b. Plaintiffs allege that the evidence that they submitted was fully qualified to be submitted to the jury for consideration

and/or decision.

2c. Plaintiffs allege that Defendant Greene rejected their evidence (and did not allow it to be submitted to the jury)(i.e., directed verdict).

2d. Plaintiffs allege that even if Defendant Greene's reasons for rejecting Plaintiffs' evidence are deemed "articulable, legitimate reasons", they were/are pretextual (for a discriminatory purpose).

3. Plaintiffs allege further that they attempted to contract with the Superior Court of the District of Columbia for a jury trial, and that part of their attempt to so contract was payment of a specific consideration (sum of money) for a jury trial (which is not required for a non-jury trial)(with prepayment being waived).

4. Plaintiffs allege that Defendant Greene, as an officer-agent of the Superior Court of the District of Columbia, refused to submit their evidence to the jury for consideration and/or decision, and, therefore, refused them a jury verdict (i.e., a jury trial) because they were African-American and poor.

Count III

42 U.S.C. SEC. 1983 AND DEPRIVATION OF PLAINTIFFS' FIFTH AMENDMENT CONSTITUTIONAL RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

1. Plaintiffs incorporate by reference all allegations asserted in Counts I and II as though they were herein asserted.

2. Plaintiffs further allege that Defendant Greene, acting under District of Columbia law, willfully deprived them of their Fifth Amendment constitutional rights to due process and equal protection of the law.

3. Plaintiffs allege that Defendant Greene deprived them of due process of law by, at least, depriving them of a fair and impartial trial by: (1) forcing Plaintiffs' counsel (by ordering him after he initially refused to do so) to reveal his litigation strategy for obtaining certain evidentiary matter from certain witnesses (i.e., how counsel would prove his case at trial) to he and defense counsel, and thereafter, using this information to prepare District witnesses for cross-examination (for example, discovering that Plaintiffs would rely on the Physician Desk Reference (PDR) for some evidence and would rely on the medical examiner as their expert and that the medical examiner would be required to rely on the PDR in order for the evidence to be admitted, thereafter, preparing the medical examiner (Dr. Comparini) to testify at trial that she doesn't rely on the PDR (albeit the PDR is universally relied upon by physicians as the primary referral source for information on drugs and/or medications); (2) unconstitutionally suppressing evidence by protecting District witnesses from from answering questions at trial that would have provided significant evidence regarding liability and negligence against the District (e.g., prohibiting counsel from questioning the medical examiner about her investigation of the death of the deceased); (3) falsely stating that he was not aware of a leading and controlling D.C. case, in order to prevent Plaintiffs from using the medical examiner as an adverse medical doctor (in order to help defeat Plaintiffs' case)(NOTE: Plaintiffs' counsel came to trial prepared with a memorandum of law on the subject, consequently, the Plaintiffs were allowed to use the doctor as a medical expert); (4) interpreting a District expert witness's response to a cross-examination question for the jury; (5) tell-

ing the jury that the deceased's death was as a result of the theory set forth by the District and its medical examiner (prior to dismissing the jury); and (6) conspiring with the court reporters to alter the trial transcript for the purpose of impeaching Plaintiffs' counsel credibility and for denying Plaintiffs certain relief at trial (e.g., bench warrant) and on appeal.

4. Plaintiffs allege that Defendant Greene, under color of law, deprived Plaintiffs of equal protection of the law by treating them (and their litigation team) differently, through disparate treatment, based on their race or color and economic state (i.e., black and poor). One example of the disparate treatment was Judge Greene's treatment of Plaintiffs' African-American health consultant expert as compared to a similarly-situated white expert. He deemed the white expert to be "clearly" qualified based on her education alone, although she had no advanced degrees. Conversely, he adjudged the black expert to be "marginally" qualified based on both her education and experience, and even though she (the black expert) had two advanced degrees, in addition to her bachelors degree and other degrees, licenses, and credentials.

5. Plaintiffs allege that Defendants Belson, Ferren, and Wagner, under color of District of Columbia law, willfully deprived Plaintiffs of their constitutional right to due process of law by denying Plaintiffs an adequate, proper, and appropriate (under the circumstances) review of their claims. That is, the Court issued an unconstitutional affirmance.

5a. Plaintiffs allege that up to and through oral argument, the Sheffield case (App. No. 89-369) was screened and assigned a "Regular" status (and was placed on the "Regular" calendar), and, invariably, "Regular" calendar cases are published, regardless of

whether the decision below is affirmed or reversed. The Sheffield's Regular case was not published. Plaintiffs allege that the case was not published because the Defendants were intent on affirming the trial judge's decision and denying the Plaintiffs relief, despite the evidence and law, and it would have been impossible to publish an affirmance without falsifying and/or manipulating the evidence or facts, therefore, a Memorandum Opinion and Judgment was submitted, which allows for conclusory findings without citing to specific evidence.

5b. Plaintiffs allege that there was no substantive analysis of the legal standard (directed verdict) , of their claims, or of the evidence Plaintiffs presented to demonstrate how the Court reached its conclusion. In essence, Plaintiffs allege, they did not receive an appeal at all. What they received was merely a "symbol without substance."

5c. Plaintiffs allege that as a result of the issuance of the MOJ rather than an analytical opinion, there was: (1) a cover-up of the very serious, gruesome, and perhaps, brutal acts committed by District employees against the deceased while she was undergoing recovery from childbirth and (2) a coverup of the serious misconduct on behalf of the trial judge during the trial proceedings, including violation of the Code of Judicial Conduct and, probably, violation of federal criminal law.

6. Plaintiffs allege that the appellate Defendants, under color of law (D.C.), otherwise deprived them of equal protection of the law, by treating them and/or their case disparately different.

6a. Plaintiffs allege that evidence of the disparate treatment can be arrived at by comparing another inmate-wrongful death

case, Finkelstein v. District of Columbia, No. 88-648, en banc, June 5, 1991, with the Sheffield case:

Similarities: (a) both cases involved allegations of wrongful death; (b) both cases involved prisoners or inmates; (c) both cases alleged a failure to respond to the needs of the deceased inmate by the respective correction officer contributed to the cause of the inmate's death; and (d) both cases were before the Court of Appeals on either a directed verdict (Sheffield) or a J.N.O.V. (Finkelstein), based partly on causation.

Equal Protection Differences: In Sheffield, the deceased prisoner was black and the family's attorney was black; in Finkelstein, the deceased prisoner was white and the family's attorneys were white.

DISPARATE TREATMENT by the herein appellate Defendants: (a) in Sheffield, the herein appellate Defendants (Belson, Ferren, and Wagner) voted to affirm the trial court's directed verdict; in Finkelstein, they voted to reverse the trial court's grant of a J.N.O.V.; (b) in Finkelstein, the herein panel sustained a ruling of an allocation of damages; in Sheffield, the panel sustained a ruling which provided for no damages. **One other important similarity: both cases were suits against the District and the trial courts' judgments were decided in the District's favor.

NOTE: in the Sheffield case, besides the failure to respond charge, there were three (3) medical malpractice claims and several other constitutional and tort claims, and much more evidence.

7. Plaintiffs allege that the so-called "appeal" in the Sheffield case was merely a "symbol without substance," for in reality they did not receive an appeal at all.

8. Finally, at least one judge of the D.C. Court of Appeals (at

the time) thought the Sheffield case was important enough to request (and require) a response from the District to Plaintiffs' Petition for an Initial Hearing En Banc (albeit the Petition was ultimately denied), yet, the herein Defendants did not publish an analytical opinion, even though the case had been placed on Regular calendar.

Count IV.

42 U.S.C. SEC. 1983 AND DEPRIVATION OF PLAINTIFFS' RIGHT TO STATUTORY ATTORNEY FEES (42 U.S.C. SEC. 1988).

1. Plaintiffs incorporate by reference all allegations in Counts I through III as though those allegations were set forth herein.

2. Plaintiffs allege further that Defendants, each and all of them herein named (except D.C.), under color of District of Columbia law, willfully deprived them of their statutory right to attorney fees, pursuant to 42 U.S.C. sec. 1988.

3. Plaintiffs allege further that as to appeal no. 89-369 (the object of this Complaint), they were the prevailing parties in both the trial court and on appeal, and, therefore, are entitled to attorney fees, based on their civil rights (sec. 1983) claims.

4. Plaintiffs further allege that but for the erroneous directed verdict depriving them of their constitutional right to a trial by jury, they would have prevailed at trial, and further, that based on the evidence of record at the time the verdict was directed, they necessarily (and as a matter of law) were the prevailing parties.

5. Plaintiffs further allege that Defendant Greene specifically and willfully deprived them of attorney fees by directing comments to their counsel indicating that counsel would not recover attorney

fees.

6. Plaintiffs allege that Defendants Belson, Ferren, and Wagner deprived them of their statutory attorney fees by unconstitutionally affirming Defendant Greene's decision, which denied them attorney fees, in full knowledge and awareness that Plaintiffs were the true prevailing parties in the trial court and on appeal.

Count V.

42 U.S.C. SEC. 1985 (3) AND PLAINTIFFS' FIFTH AMENDMENT RIGHT TO EQUAL PROTECTION OF THE LAW.

1. Plaintiffs incorporate by reference here all allegations made in Counts I through IV as though they were herein alleged.

2. Plaintiffs further allege that all Defendants herein, under District of Columbia law, conspired, at least indirectly, to deprive them of equal protection of the law as to their Seventh Amendment right to a trial by jury and their Fifth Amendment right to due process of law, based on their race or color (African-American or black) regarding the civil case of Alice Sheffield v. District of Columbia, CA NO. 9799-87 and App. No. 89-369.

3. Plaintiffs allege that Defendant Greene acted in furtherance of the conspiracy by deliberately and with ill-will directing a verdict in favor of the District in view of Plaintiffs overwhelming evidence supporting their case and against the District and by treating the Sheffield case differently from, at least, the case of Washington v. Washington Hospital Center, 579 A.2d 177 (D.C. 1990) (in that case, he stated that the case would be submitted to the jury based on a party's admission (and 3 other supportive documents) alone), the Sheffield case had much more evidence than Washington (where liability was premised on a theory of causation) but

he did not submit it to the jury.

4. Plaintiffs allege that Defendants Belson, Ferren, and Wagner acted in furtherance of the conspiracy by affirming Defendant Greene's actions in full view, and awareness of the overwhelming evidence Plaintiffs produced and the serious misconduct by Defendant Greene in governing the trial proceedings; by not providing Plaintiffs with a due process and meaningful appeal (in essence, they had no appeal at all), especially when considering the complexity (or seriousness) of several of the claims--indeed, Plaintiffs' medical malpractice claim based on an overdose of morphine was not even mentioned in the appellate Defendants' Memorandum Opinion and Judgment, and this was the most serious local law claim brought (and upon which Plaintiffs had the most evidence--which is why it was not mentioned, Plaintiffs contend); and by treating their appeal differently from that of Finkelstein which they voted to reverse (where Plaintiffs herein had at least as much or more ^{evidence} to support their claim of a failure to respond as in Finkelstein, supra).

5. Plaintiffs allege that Defendant Greene conspired, at least indirectly, with the trial court reporters to alter the trial transcript in order to deny Plaintiffs equal protection to a due process fair trial and appeal.

6. Plaintiffs allege that Defendant Belson and other members of the D.C. Court of Appeals conspired to assign Defendant Belson to sit on the panel and write the opinion in the Sheffield case for the purpose of denying Plaintiffs monetary damages and other relief. Evidence of this allegation is that in another and separate appeal involving the herein Plaintiffs, Defendant Belson dismissed an appeal of unquestionable final orders, which would have granted

Plaintiffs monetary relief. His justification for refusing to review the final orders was that because there was a pending wrongful death action, whereby Plaintiffs might obtain monetary relief (if the action would be resolved in their favor), there was no need to grant Plaintiffs their rightful and statutory appeal of final orders because if the Plaintiffs recovered money in the Sheffield case that would supply them with all the money they might need for the matters which were the subject of the final orders. Thereafter, after being assigned to write the opinion in the Sheffield case, Defendant Belson (and the remaining appellant Defendants herein) denied Plaintiffs all relief. Consequently, Plaintiffs were denied relief in both the prior appeal and the Sheffield case (i.e., all relief), where but for Defendant Belson's justification of the pending Sheffield case, their final orders in the prior appeal would have been required to be reviewed and they would have been granted relief (in all likelihood).

6a. Plaintiffs allege that further evidence of a conspiracy to have Defendant Belson assigned to the Sheffield appeal (and to write the opinion) for the purpose of denying Plaintiffs relief is the fact that Defendant Belson had prejudged another (and different) appeal involving the herein Plaintiffs and was recused or removed from the appeal; therefore, he ought not have been assigned to the Sheffield case for that reason alone (and Plaintiffs had strongly recommended that he not be so assigned by asserting that he should be recused from the appeal--through a Petition for an Initial Hearing En Banc).

7. Plaintiffs allege that they were in fact deprived of equal protection of the law and suffered injury therefrom, as identified here and in Counts I through IV.

DECLARATORY RELIEF SOUGHT

As declaratory relief, Plaintiffs request that the Court:

1. Declare that Defendant Greene's directed verdict (and the judgment pursuant thereto) in the case of Alice Sheffield v. District of Columbia, et. al., CA NO. 9799-87, was unconstitutional as violative of the Seventh Amendment of the United States Constitution, which guarantees Plaintiffs the right to a trial by jury.

2. Declare that Defendants Belson, Ferren, and Wagner's affirmation of Defendant Greene's directed verdict judgment was unconstitutional as violative of the Fifth Amendment and Seventh Amendment of the United States Constitution.

3. Declare that Defendant Greene exercised racial discrimination against the Plaintiffs herein during the trial proceedings in violation of 42 U.S.C. sec. 1981 (and sec. 1983).

4. Declare that Defendant Greene's conduct in governing the Sheffield case deprived Plaintiffs of Fifth Amendment constitutional rights to due process and equal protection of the law.

5. Declare that the conduct (and treatment of Plaintiffs' appeal) of or by Defendants Belson, Ferren, and Wagner was unconstitutional as violative of Plaintiffs' Fifth Amendment rights to due process and equal protection of the law.

6. Declare that all individual Defendants herein unlawfully deprived Plaintiffs of their statutory right to civil rights attorney fees, pursuant to 42 U.S.C. sec. 1988 (and 1983), in the Sheffield case on both the trial and appellate levels.

7. Declare that the District of Columbia, in the Sheffield case, defaulted (nearly as a matter of law) and it was an abuse of dis-

cretion for the trial court to refuse to enter a default judgment against the District.

INJUNCTIVE RELIEF

As injunctive relief, if necessary, Plaintiffs request:

1. That the Court enjoin the Superior Court of the District of Columbia from denying Plaintiffs a trial by jury whereby the jury must return a verdict.
2. That Defendant Greene be enjoined from governing any litigation in the future involving the herein Plaintiffs.
3. That the D.C. Court of Appeals be enjoined from denying the herein Plaintiffs a due process and equally protected appeal.
4. That Defendants Belson, Ferren, and Wagner be enjoined from governing any litigation in the future involving the herein Plaintiffs.

OTHER RELIEF

Plaintiffs request the following other relief:

1. That the Court orders that the trial by jury, upon a grant of relief, take place in Federal court, rather than the Superior Court of the District of Columbia, especially since the case involves several Federal claims and could have been brought in federal court initially.
2. That, alternatively, if the Court does not find a total default by the District, the Court orders a trial on damages only

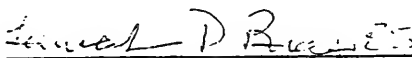
as to four(4) Counts of Plaintiffs' Second Amended Complaint, based on the fact that as to these specific Counts or claims (i.e., Counts I, II, XIII, and XV), the District could not offer a viable defense at trial that could defeat the claims.

3. That the Court orders that Plaintiffs herein be paid civil rights attorney fees for the herein litigation.

See the related cases of Sceva J. Kendall v. John Ferren, et. al.,

CA NO. _____ and Laurack D. Bray v. James Belson, et. al.,

CA NO. _____, filed concurrently herewith.


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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCEVA J. KENDALL

Serve at: 2423 14th Street, N.E. #2
Washington, D.C. 20002

Plaintiff,

v.

JOHN FERREN, JOHN TERRY, AND MICHAEL FARRELL

Individually and as Judges of the D.C. Court
of Appeals

Serve at: D.C. Court of Appeals
D.C. Courthouse
500 Indiana Avenue, N.W. 6th Floor
Washington, D.C. 20001

Defendants.

CA NO. 91-2543

COMPLAINT

DECLARATORY JUDGMENT AND OTHER RELIEF

Jurisdiction

1. Jurisdiction of this court is invoked pursuant to 28 U.S.C. sections 1331, 1343, 2201, and 2202; 42 U.S.C. section 1983; and the Fifth Amendment of the United States Constitution.

Parties

1. The Plaintiff is Sceva J. Kendall.
2. The Defendants are John Ferren, John Terry, and Michael Farrell, being sued individually and as judicial officers of the

District of Columbia Court of Appeals.

Statement of the Facts

Plaintiff alleges that a brief statement of the pertinent facts is as follows:

1. Mr. Sceva J. Kendall was convicted and sentenced in the Superior Court of the District of Columbia for possession with the intent to distribute cocaine (PWID). He noted a timely appeal.

2. On appeal, Mr. Kendall, through his Brief, raised and argued five(5) issues which he asserted required reversal of his conviction and his acquittal: (1) whether the trial court erred in denying Mr. Kendall's motion to suppress the tangible evidence, where the arresting officers lacked probable cause to make a warrantless arrest? (2) whether the trial court erred in denying Mr. Kendall's motion for judgment of acquittal after close of all the evidence, where there was insufficient evidence at trial to prove him guilty of PWID beyond a reasonable doubt? (3) whether the trial court committed reversible error in admitting hearsay testimony of the government's so-called informer? (4) whether admission of the so-called informer's testimony at trial violated the Confrontation Clause of the Sixth Amendment of the United States Constitution (and Mr. Kendall's right of confrontation), where Mr. Kendall was unable to cross-examine and/or confront the informant at trial? and (5) whether it was plain error (and, therefore, reversible error) for the trial court to admit into evidence government's Exhibit #4, even in absence of objection thereto? Mr. Kendall argued that all of the above-mentioned issues should have been decided in his favor and, consequently, would have required or caused his acquittal.

3. The Court of Appeals, through the identified Defendants herein, or vice-versa, denied Mr. Kendall oral argument on any of the issues raised, albeit he specifically requested oral argument; it apparently disregarded his Brief; and, acting positively on the government's "mysterious" motion to remand for a new trial*, remanded Mr. Kendall's case for a new trial, without deciding or discussing the issues raised in his Brief on appeal (including the issue as to sufficiency of the evidence) and through an unpublished order without comment.

*NOTE: Mr. Kendall did oppose the government's motion (however, in his written request for oral argument, he stated that he would agree to a remand to enter a judgment of acquittal).

4. On re-trial, after bond review, status, and motions, the government dismissed Mr. Kendall's case.

Count I

42 U.S.C. SEC. 1983 AND DEPRIVATION OF PLAINTIFF'S FIFTH AMENDMENT CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

1. Plaintiff alleges that Defendant Terry, Ferren, and Farrell, under color of District of Columbia (and District of Columbia Court of Appeals) law deprived him of his Fifth Amendment right to due process of law. That is, he was deprived of his liberty and the right to prove his innocence on appeal without due process of law.

2. Plaintiff alleges that the above-named Defendants deprived him of his liberty and the right to prove his innocence on appeal without due process by precluding his appeal of issues that would have caused his acquittal, or, at least, a reversal without a remand for a new trial, which, in turn, would have caused his freedom from incarceration (and each day that he remained incarcerated after the order to remand for a new trial (rather than a reversal or a reversal and remand to enter a judgment of acquittal) was a loss of

liberty without due process).

3. Plaintiff alleges that his primary purpose for appealing his conviction was to prove his innocence, that is, that he did not commit the crime with which he was charged, and because he did not get to address the very issues that would have given him the opportunity to so prove his innocence, he was, in essence, deprived of that purpose and the right of appeal directed thereto.

4. Plaintiff alleges that he continues to suffer injury from his denied right to a due process appeal and from his denied right to prove his innocence of the crime with which he was charged because the record does not reflect that he was acquitted or that the government lacked probable cause to arrest him (which would go to sealing of his arrest record and civil actions).

5. Further, Plaintiff alleges that the order to remand for a new trial, without more, was a denial of due process because it provided no guidance or directions for the new trial as to avoid a repetition of error. For example, see Clark v. United States, NO. 89-700, D.C., June 21, 1991, where ". . . Clark is entitled to a new trial. We briefly address those of Clark's remaining claims of error which are likely to arise if and when the case is tried again." The remand was also retaliatory, see Sheffield v. D.C., App. No. 89-369 (D.C. Court of Appeals) (based on counsel's conduct).

6. Plaintiff alleges that he was denied due process by the herein Defendants not acknowledging and relying on his Brief to determine and/or decide the issues raised on appeal.

7. Plaintiff alleges further that the Defendants knew when they remanded his case for a new trial without addressing the issues of his denied motions for suppression of the tangible evidence and for judgment of acquittal and of plain error in admitting a government exhibit (i.e., sufficiency of the evidence to prove guilt) that such

conduct was at least improper, based on their own (i.e., D.C. Court of Appeals) case law. See, i.e., Kind v. U.S., 529 A.2d 294 (D.C. App. 1987)(Mack, J., concurring) where "Under the Double Jeopardy Clause, remand for retrial is forbidden where the evidence presented in the original trial was insufficient to convict. (Citation omitted). . . . If asked, a reviewing court must always assure itself that retrial is constitutionally permitted under the Double Jeopardy Clause, and if we had not done so here, our remand for a new trial would be improper." (Emphasis added).

Count II

42 U.S.C. SEC. 1983 AND DEPRIVATION OF PLAINTIFF'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAW.

1. Plaintiff incorporates by reference all allegations set forth in Count I as though they were herein alleged.

2. Plaintiff alleges further that Defendants herein, under color of District of Columbia law, deprived him of equal protection of the law, by retaliating against him for his counsel's conduct (Sheffield)

3. Plaintiff alleges that he was at least deprived of equal protection by having his case being treated differently from the cases of Brown v. U.S., No. 86-1276, D.C., May 8, 1991 and Cauthen v. U.S., No. 89-1216, June 7, 1991, where all three cases (including the Kendall case) involved anonymous tips, reasonable suspicion, and probable cause to arrest and where all three cases focused on the United States Supreme Court case of Alabama v. White, 110 S.Ct. 2412 (1990) as being decisive or instructive.

First of all, oral argument. In both Brown and Cauthen, Appellants, through counsel, were granted oral argument. Mr. Kendall,

who specifically requested oral argument, was denied oral argument. In Cauthen, oral argument was performed in part by a white student counsel who requested and was granted the right to orally argue the case. In the Kendall case, Mr. Kendall had retained (i.e., paid and incurred costs) an attorney to represent him on appeal, but the Court of Appeals denied his attorney the right to orally argue his appeal. His attorney was black.

Second, appellant Briefs and the Court's reliance thereon. In neither Brown nor Cauthen did the appellants cite nor discuss Alabama v. White, supra (neither in their Table of Authorities nor their Argument section of the Brief--i.e., nowhere in the Brief). But, in both cases, the Court performed an extensive discussion of White in its written opinion, with Cauthen going so far as to state, "Alabama v. White. . . , on which appellant heavily relies" and "Appellant argues that the anonymous tip was inadequate under White because it contained no predictions as to anyone's future behavior" (Emphasis here and in original). If the Appellant in Cauthen indeed "heavily relie(d)" on White as the Court opinion indicates, he certainly did not do so in his Brief (he didn't even cite White --not to mention cite it as a case chiefly or principally relied upon). Conversely, Mr. Kendall's Brief specifically cited, discussed, and principally relied on White in urging reversal and Mr. Kendall's acquittal. Yet, the Defendants herein not only did not cite to or discuss White in their remand order, but they also totally disregarded Mr. Kendall's Brief and arguments.

Third, the published opinion. In both Brown and Cauthen, the Court published a written opinion (with analysis) discussing White extensively, especially in Brown. This causes Appellant's counsel in both cases to be acknowledged and credited with causing the re-

versal (based on and through their written and oral argument). In Mr. Kendall's case, the Defendants' herein produced an unpublished order that cites no cases, not even White, and, that same unpublished order facially credits the government with a granted motion (even though argument in Mr. Kendall's Brief caused the "mysterious" motion) and makes it appear as if the government was the prevailing party on appeal and that the government did Mr. Kendall a favor in moving to remand.

Mr. Kendall alleges that it is particularly striking that the court's discussion of White (and argument related thereto) in Brown mirrors the argument in his Brief (i.e., anonymous tip, reliability, and credibility--notice the format of the argument in the Brown and Kendall cases). It is also striking that Defendant Ferren was a member of the majority panel in Brown who voted to publish the opinion in that case. Yet, he did not so vote to publish (apparently) in the Kendall case, where Mr. Kendall himself (through counsel)(and not the Court) argued and/or discussed White specifically.

Finally, the majority panel in Brown (including Defendant Ferren) granted the Defendant's motion to suppress the evidence, but the panel in Mr. Kendall's case (including Defendant Ferren) voted to remand the case for a new trial (even though the facts in Mr. Kendall's case were more compelling for granting the motion to suppress than in Brown because Mr. Kendall, in contrast to the Defendant in Brown--where there was actual possession of contraband on the Defendant's person at the time of the arrest, did not possess any contraband on his person when he was seized, i.e., constructive possession). And, the Brown case was decided before the Kendall case. Brown was decided May 8, 1991 and Kendall, May 15, 1991.

4. Mr. Kendall alleges that part of the Defendants' motivation for their discriminatory actions in his case was retaliation (towards his appellate counsel, for counsel, on appeal, having charged a trial judge with racial discrimination--in a separate, civil appeal, see Alice Sheffield v. District of Columbia, et. al., App. No. 89-369(D.C. Court of Appeals)). See also related Complaint filed herewith, Alice Sheffield, et. al. v. Henry F. Greene, et. al. CA NO. _____ (1991). NOTE: Because Mrs. Sheffield filed a Petition for Initial Hearing En Banc, all members of the regular Court of Appeals were required to read the Brief which contained the charge and discussion thereof.

4a. Mr. Kendall alleges that other incidents of prejudicial actions that resulted from retaliation were: (1) after Mr. Kendall had moved for a release pending appeal and the motion had been denied (even though Mr. Kendall refuted all reasons the government had argued against the release), the order denying the motion was sent to a false address, so counsel for Defendant never received it and Mr. Kendall lost his ordinary right to move for a rehearing of the denied motion (i.e., time for so moving having expired without his knowledge); (2) after the court ordered Mr. Kendall's case removed from the March, 1991 argument calendar (i.e., the original briefing schedule canceled), that order was sent to a false address as well, so Mr. Kendall's counsel never received that order either; therefore, and consequently, the time passed for Mr. Kendall to move for a reconsideration of that action so that the case might be placed back on the original March, 1991 calendar; and (3) because the government conceded that his conviction would have to be vacated and the judgment reversed, Mr. Kendall filed a Petition for a Writ of Habeas Corpus renewing his request for a release pending appeal.

The Court of Appeals refused to materially act on his Petition (i.e., grant or deny it) until after appellate proceedings were complete and during re-trial proceedings, and then, acted to dismiss the Petition for a lack of subject matter jurisdiction.

Count III

42 U.S.C. SEC. 1983 AND DEPRIVATION OF PLAINTIFF'S FIFTH AMENDMENT CONSTITUTIONAL RIGHT NOT TO BE SUBJECTED TO DOUBLE JEOPARDY.

1. Plaintiff incorporates by reference each and every allegation set forth in Counts I and II, as though they were herein alleged.

2. Plaintiff alleges that Defendants herein, under color of District of Columbia law, willfully deprived him of his Fifth Amendment constitutional right not to be subjected to double jeopardy; and that he was so subjected to double jeopardy.

3. Plaintiff alleges that because the Defendants did not act on or address the issue of insufficiency of the evidence on appeal, as they should have, it allowed the government the right to re-try him on remand, and it caused the trial court (on remand) to deny his motion to dismiss the case against him on double jeopardy grounds.

4. Plaintiff alleges that he was subjected to a bond review hearing, a status hearing (at which the government made a plea offer which Plaintiff refused), and a motions (suppression) hearing (at which the government dismissed the case), which he would not have been subjected to if the Defendants would have reviewed the issues regarding sufficiency of the evidence, and, thereafter, would have found in his favor (and reversed and remanded to enter a judgment of acquittal or simply reversed--without a remand for a new trial).

Count IV

42 U.S.C. SEC. 1983 AND DEPRIVATION OF PLAINTIFF'S RIGHT TO COSTS.

1. Plaintiff incorporates by reference each and every allegation set forth in Counts I and II, as though said allegations were herein alleged.

2. Plaintiff alleges that Defendants herein, under color of District of Columbia law, deprived him of his right to costs pursuant to Rule 39 of the D.C. Court of Appeals rules by designating the government as the prevailing party on appeal (i.e., granted motion to remand), when in actuality Plaintiff was the prevailing party (because he received the relief--a type--that he sought on appeal).

3. Plaintiff alleges that whether it is by grant of the government's motion to remand for a new trial or by direct reversal and remand for a new trial, the judgment was reversed and he was in fact, and as a matter of law, the prevailing party on appeal.

4. Plaintiff alleges that in reference to Rule 39's allowance of costs where the decision has been reversed on appeal, even if the remand for a new trial does not necessitate a reversal, a proper review of his issues raised on appeal would have required a reversal nonetheless.

DECLARATORY RELIEF

Plaintiff requests that the Court declare the following:

1. That the Defendants' order to remand for a new trial in the case of Kendall v. U.S., App. No. 90-378 (D.C. Court of Appeals) was unconstitutional as violative of the Fifth Amendment of the United States Constitution (on due process, equal protection, and double jeopardy grounds).
2. That for purposes of Rule 39 costs, the decision in the Kendall case was reversed (or alternatively, Mr. Kendall was the prevailing party), and therefore, costs shall be taxed against the appellee (United States).

OTHER RELIEF

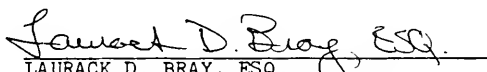
Plaintiff requests the following other relief:

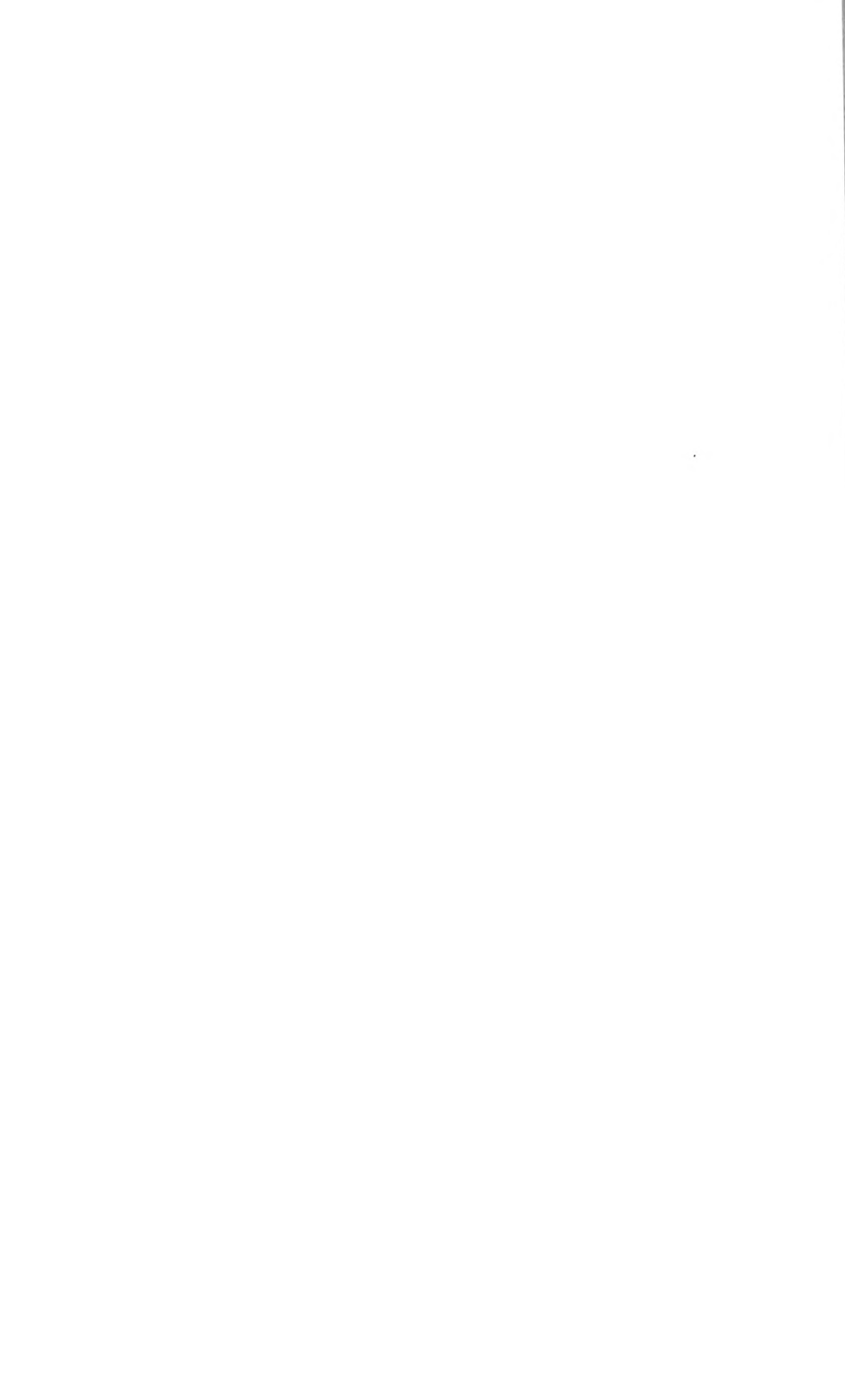
1. That the Court perform a de novo review of his Brief and the Record to determine whether a judgment of acquittal should have been entered on Mr. Kendall's behalf (and thereby determine his innocence regarding the charges against him).
2. Order, pursuant to the Court's inherent power to do so, that Rule 39 costs include attorney's fees based on the circumstances of the treatment of his appeal; and, also, based on special events, order that he be paid attorney's fees for all post-appeal matters (i.e., re-trial matters) if the Court finds that he should have been acquitted on appeal or that the evidence was insufficient to permit a re-trial.
3. Order that Plaintiff be paid attorney fees for the herein

litigation.

4. Order, if within the Court's jurisdiction, that Mr. Kendall's arrest record regarding the arrest and conviction in question here, be expunged or otherwise sealed based on a lack of probable cause by the arresting officers in the case to legally or constitutionally effectuate an arrest.

See the related cases of Alice Sheffield, et. al. v. Henry F. Greene, et. al., CA NO. _____, and Laurack D. Bray v. James Belson, et. al., CA NO. _____, filed concurrently herewith.


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NOMINATION OF ROSEMARY BARKETT, OF FLORIDA, TO BE U.S. CIRCUIT JUDGE FOR THE ELEVENTH CIRCUIT

THURSDAY, FEBRUARY 3, 1994

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:14 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Joseph R. Biden, Jr., chairman of the committee, presiding.

Also present: Senators Heflin, Simon, Moseley-Braun, Thurmond, Hatch, Simpson, Grassley, and Cohen.

OPENING STATEMENT OF CHAIRMAN BIDEN

The CHAIRMAN. The hearing will come to order.

I would like to invite the judge, as well as our two esteemed colleagues to the table, if they could. The order in which we will proceed is Senator Hatch and I have relatively brief opening statements, and then we will invite our colleagues from Florida to introduce to the committee the judge, as well as her small family, and then we will swear the judge and we will get under way.

The committee is convened to consider the nomination of Chief Justice Rosemary Barkett, of the Florida Supreme Court, to become a judge on the U.S. Court of Appeals for the Eleventh Circuit.

Justice Barkett enjoys an impressive background, by any measure. Her personal story is intriguing, and her professional life is marked by commitment to excellence, public service, justice and, I might add, integrity.

Born in Mexico, one of 16 children, Justice Barkett came to the United States as a child, speaking only a few words of English. As a young woman, Justice Barkett became a nun, a vocation she continued until 1967. During her time in the convent, she was known as Sister Michael, reminding me of my last mother superior, Sr. Michael Murray. I hope you are going to be more lenient on me than she was. And she was also a sister of St. Joseph's. [Laughter.]

During this time, while the nominee taught in elementary and secondary schools, she also earned her B.S. degree *summa cum laude* from Spring Hill College. Justice Barkett then entered law school at the University of Florida. She finished at the top of her class, the class of 1970, earning an award for the outstanding student, the outstanding graduate.

Justice Barkett had a distinguished 9-year career as a lawyer in private practice. In 1979, then Gov. Bob Graham appointed her to

fill an unexpired term on the bench as a trial judge. She served as a trial judge until 1984, when Governor Graham appointed her to the court of appeals. One year later, Governor Graham appointed Rosemary Barkett to the Florida Supreme Court, making her the first woman to sit on the court.

Facing an election to retain her seat on the supreme court in 1992, Justice Barkett garnered a number that any one of us in this body would love to get within 10 points of; 61 percent of the people of her State decided that she should retain that seat.

Following that election, her colleagues on the court named her chief justice. And I might add, a number of issues raised that will be raised here today about your view on the death penalty and the rest were raised in your State of Florida when you sought reelection.

One of the things I found somewhat interesting is Florida has been, generally speaking, a State that has been, if not preoccupied, spent a lot of time on the criminal justice system and concern about crime. The fact that 61 percent of them thought you should go back on the bench obviously says something about what your attitude on these issues are.

Thus, Justice Barkett has observed the practice of law from the perspective of a litigant, as a trial judge, and ultimately undertaking the task of appellate review. Her more than 20 years in the legal profession, her thousands of cases on the supreme court, court of appeals, trial court, and private practice provide her with a wealth and a breadth of experience to take with her to the eleventh circuit.

One mark of esteem she held over the years is the fact that, in 1992, the Academy of Florida Trial Lawyers created the Rosemary Barkett Award, which is presented annually to a person who has demonstrated outstanding commitment to equal justice under the law.

I mention almost as an aside that, by unanimous vote, the American Bar Association's Judicial Selection Committee rated Justice Barkett well qualified to sit on the eleventh circuit. They cannot rate it any higher than that.

I know that critics of Justice Barkett, both during the retention election and now here, have raised concerns about the nominee's views on the death penalty. As everyone knows, I support the death penalty, and I have looked carefully at this issue. I hope Justice Barkett's record will be considered in its entirety, especially given that, during her 8 years on the court, she has participated in literally hundreds of death penalty cases.

I will look at Justice Barkett's complete record and focus on whether she will apply the law in accordance with the standards and precedents that bind eleventh circuit judges.

A distinction, Judge, I am going to ask you to make is as to how you view the distinction between being a supreme court justice in the State of Florida, looking at the Florida Constitution, as well as the U.S. Constitution, and what you believe the role in your view of stare decisis, how it binds you or not as an eleventh circuit court of appeals judge in the Federal system.

I will question Justice Barkett about her role on the State supreme court and ask her to comment on a distinction, as I said, between those roles and the role of a Federal appellate judge.

Further, I am interested in your views of your obligation to adhere to precedent and your view on the restrictive roles of the courts and legislatures in determining the meaning of the statute. I also will ask you, Justice Barkett, to make a distinction for the record as to whether or not applying the law, whether it is a death case or any other case, whether your obligation as a supreme court justice for the State of Florida requires you to look at the Florida Supreme Court where it may or may not diverge from the U.S. Supreme Court or the U.S. Constitution.

Throughout the 12 years of Republican nominees to the Federal bench, I have maintained that three factors should govern my decision for a lower court judge. Lower meaning lower than the Supreme Court. I view the Supreme Court the only court in the land that can overrule its own decisions.

First, does the nominee have the capacity, competence, and temperament to be a court of appeals judge; second, is the nominee of good character and free of conflicts of interest; and, third, would the nominee faithfully apply the Constitution and the precedents of the Supreme Court.

I have voted for some judges with whom I hardly have anything in common, whose view of constitutional interpretation vary sharply from mine, but I believed them to be honorable people who have a view of stare decisis and would apply the law as the court has seen it. I will apply this standard in the case of Justice Barkett, as well.

So I welcome you, Justice Barkett. I look forward to seeing you, and I hope that—I say this to all nominees who come before the committee—I hope that your graciousness and cordiality will not cease once the lifetime robe is placed over your shoulders.

I see one of the leading lawyers in the State of Florida smiling. He knows what I mean. I find that all nominees are nice to Senators while things are moving on, but after they get confirmed, I am almost reminded by all of them how they are not politicians, when an awful lot of them got their jobs because they were politicians. At any rate, excuse the aside, but it is something I often speak to and I should not.

I yield to my friend from Utah, the ranking member.

OPENING STATEMENT OF SENATOR HATCH

Senator HATCH. Thank you, Mr. Chairman.

I welcome you, Justice Barkett, and I certainly welcome our esteemed colleagues, both of whom are very strongly supporting you, and that is something that we take great notice of, as well as the fine person you are. I welcome you to the committee and I congratulate you on the honor of being nominated to this very prestigious position by President Clinton.

Chief Justice Barkett and I had an opportunity to meet, more than once, and I enjoyed our conversations in the past, and I have absolutely no doubt as to your competence and ability.

Where I am concerned, however—and I should state it straight up—is about your judicial philosophy, and I intend to explore some

of these concerns today and, of course, allow you the full opportunity to respond. To enable you to do so, I have provided you with a list of cases that I probably will explore with you, and hopefully that has been helpful to you.

In my view, Mr. Chairman, the political and policy views of the judicial nominee are not relevant to evaluating such a nominee. What is important is that the nominee interpret the law according to the meaning of its Framers. Differences over such meaning obviously can occur.

But if the touchstone of interpreting our laws is not the intent, the meaning of the Framers of the law, then a judge is simply legislating his or her own policy preferences or political preferences from the bench. A judge who does this usurps the role of democratically elected legislators reserved to them by the Constitution.

I should also note that in the case of the Constitution, while its meaning in my view remains unchanged, it is clearly applicable to changing circumstances. Just as there is a fundamental distinction between politics and judges, there is a basic difference between a political litmus test and an inquiry into a nominee's jurisprudential outlook.

An essential part of my constitutional duty as a Senator in the confirmation process, and certainly as ranking member on this committee, is to ensure that judicial nominees will faithfully interpret and enforce the Constitution and other laws of the United States.

Now, that does not mean, of course, that a nominee must agree with my interpretation or any other Senator's interpretation in all cases. I have voted to confirm judges nominated by Republican and Democratic Presidents who had ruled in other judicial positions or who I could anticipate would rule differently from me in a good-faith application of the law in more than a few instances. Indeed, I voted to confirm such a nominee, Ruth Bader Ginsburg, for the Supreme Court last year.

It does mean, however, that in fulfilling their duties, judges need to keep their political and policy views out of the interpretation of the law. If a nominee's record or responses give me reason to doubt a nominee's ability or willingness to do so, I cannot vote to confirm that nominee, no matter how much I may like the person. In this case, I happen to like Justice Barkett very much.

Accordingly, there are a range of jurisprudential issues that concern me. A nominee's interpretation of the equal protection clause and the due process clause of the Constitution, for example, are indicators of a judge's overall judicial philosophy, and, if a lower court judge, certainly are indicative of fidelity to precedent.

A nominee's view of the community's ability to control obscenity is important. A nominee's judicial outlook on enforcement of the criminal law is also very important, especially at this time when this is probably one of the most important issues in America today. I think it has been a very important issue for most of the last 20 years, certainly all of this country's existence, but especially the last 20 years.

Further, let me emphasize that, with regard to the criminal justice arena, I am concerned not just with the death penalty, as some people seem to believe. In fact, that may be, as important as it is,

maybe one of the lesser concerns that I have. I am concerned with the broad array of criminal law issues.

If judicial nominees, for example, are prone to invent hyper-technical rules that hamstring law enforcement and that cripple the ability of communities to police themselves, if they misuse or ignore relevant precedent or the statutes themselves in a manner favoring criminal defendants and convicts, then I would question whether they have the jurisprudential outlook necessary to be a Federal judge, and certainly a circuit court of appeals judge.

Moreover, let me note that, with respect to the death penalty itself, I am not only concerned about a nominee's views about the constitutionality of the death penalty in theory, nor is a proper inquiry about a nominee's judicial outlook in this area ended merely by noting that the nominee has upheld the death penalty in some or even a number of cases, where even the most activist of judges cannot avoid its imposition.

If a nominee exhibits a clear tendency to strain for unconvincing escapes from the imposition of the death penalty in cases where the death penalty is in fact appropriate, then that raises concerns in my mind about the nominee's fidelity to the law, no matter how many times the nominee may have upheld the death penalty in other cases.

In an earlier hearing, I closely questioned two judicial nominees, one of whom I later supported and one of whom I opposed. I am looking forward to the answers to my questions and will weigh them, of course, in the evaluation of the nominee. My natural tendency is a desire to support the nominee. My natural tendency is a desire to support the nominee of the President of the United States. He won the election and he ought to be able to make this choice. Frankly, I think my record here on the committee has shown that through the years.

That basically would be my feeling this morning, Mr. Chairman. I appreciate you giving me this time.

The CHAIRMAN. As a former chairman of this committee, Senator Thurmond would say I hope you follow your tendencies. [Laughter.]

Senator HATCH. I probably will.

The CHAIRMAN. Senator Moseley-Braun, do you have a comment you wish to make?

OPENING STATEMENT OF SENATOR MOSELEY-BRAUN

Senator MOSELEY-BRAUN. Well, Mr. Chairman, I had not expected to make an opening statement, except to welcome Judge Barkett to this panel. I look forward to her testimony. Her credentials seem to be impeccable, if not outstanding, and I am delighted, frankly, if I may add a personal side, to see a woman going on the Court of Appeals.

The CHAIRMAN. Thank you.

Senator Cohen, I am sorry. You have been here the whole time. You were here before everyone. I apologize.

OPENING STATEMENT OF SENATOR COHEN

Senator COHEN. Thank you, Mr. Chairman.

I am going to refuse to follow *stare decisis* in this case. I am going to forego the precedent of making a long statement. I wel-

come the Justice and look forward to hearing from both of our colleagues about your character and qualifications to serve on the court.

Thank you very much.

The CHAIRMAN. Thank you.

Judge the usual precedent is only the chairman and the ranking member get to say anything. Maybe we will reinforce that.

All kidding aside, let me invite our friend, a former Governor, the senior Senator, Senator Graham, to make any comments he wishes to, and then we will ask you to speak to us, Connie.

STATEMENT OF HON. BOB GRAHAM, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator GRAHAM. Thank you very much, Mr. Chairman, Senator Hatch, other members of the committee.

We appreciate the opportunity to be here today and to introduce to you a distinguished Floridian, Justice Rosemary Barkett, a nominee of the President for the Eleventh U.S. Circuit Court of Appeals.

Mr. Chairman, in your opening statement, you gave a substantial amount of the history of Justice Barkett, which is also contained in my statement. So in an effort to avoid repetition, I would like to ask that my full statement be included in the record.

The CHAIRMAN. Without objection, it will be.

Senator GRAHAM. I will omit those parts that are redundant to what the Chairman has already placed in the record.

I would like also to indicate that the Member of Congress who represents the Tallahassee area, the city in which the chief justice now lives and carrying out her responsibility, Congressman Pete Peterson, had intended to be with us today. A conflict in his schedule in the House prevented him from doing so, and he asked if I would convey to the committee his strong support for Justice Barkett.

The CHAIRMAN. Thank you. It will be noted.

Senator GRAHAM. Mr. Chairman, I have had the great fortune of knowing Justice Barkett personally for more than 15 years, and in that time I have been profoundly impressed by her intelligence, her compassion, her curiosity of mind, her humility of spirit.

It has been said that Justice Barkett's life is a commentary on the American dream. You have outlined previously a life that stretches from a child born of immigrant parents in Mexico, who came to the Untied States while she was still a young girl, who has lived through many experiences that have given her an unusual breadth of understanding of the human experience, a background which she has applied ably throughout her judicial career.

She also comes from a very large family. There are approximately 35 members of her family who join us today. I would like to ask if they would stand.

The CHAIRMAN. Maybe just ask the ones who are not members of her family. [Laughter.]

Senator GRAHAM. That might result in less disruption, Mr. Chairman. But I wonder if I could ask the members of her family to stand.

The CHAIRMAN. We would be honored to meet the family.

Senator COHEN. Is this just the immediate family? [Laughter.]

Senator GRAHAM. This is the immediate family.

Just to mention her most immediate members of the family who are here, her brother Assad Barkett, Jr., of Homestead, FL; her sisters, Irma Elder of Detroit; Chati Barkett of Homestead; and Carmen Doumar of Fort Lauderdale are here. Unfortunately, Justice Barkett's parents are not among the family here today. Her aged mother, who I understand is about to celebrate her 75th wedding anniversary, is ill, and her husband is at her side. But this is certainly one of the proudest moments for the parents and all of the members of Justice Barkett's family.

As you mentioned, Mr. Chairman, I had the privilege on three occasions to appoint Justice Barkett to positions of increasing responsibility in the Florida judiciary.

I think one of the impressive things about her judicial service is that shortly after I had appointed her to a position, she was then selected by her peers to be their leader. For instance, I appointed her in 1979 to be a trial judge on the fifteenth judicial circuit, which is primarily in the Palm Beach County area. She was soon elected as the chief judge by her peers. She has now been elected by her peers on the Florida Supreme Court to be not only the first woman on the court in our State's history, but the first chief justice in our State system.

As you indicated, Justice Barkett has received a number of awards and recognitions, including eight honorary doctorates, numerous other awards, including the Lifetime Achievement Award presented by the Latin Business and Professional Women and the Hannah G. Solomon Award presented by the National Council of Jewish Women.

As you indicated, Mr. Chairman, the Academy of Florida Trial Lawyers has established a Rosemary Barkett Award, which each year recognizes a person who has demonstrated outstanding commitment to equal justice under law. I might say that the first recipient of that award was Congresswoman Carrie Meek, who you know well and can evaluate how significant it is to have a person of her quality be recognized by receiving an award named for Justice Barkett.

Justice Barkett has served on numerous commissions and task forces, including the American Bar Association's Steering Committee on Unmet Legal Needs of Children. She has been asked by the Florida Legislature to chair several major commissions, including one to reform guardianship law, another to study status and needs of Florida's welfare children.

Throughout her career, Justice Barkett has displayed not only a remarkable combination of intelligence and integrity, but also an uncompromising respect for the law. In Florida, she is respected statewide as a judge who treats all people with equal dignity, without arrogance or condescension.

Mr. Chairman, you pointed out a significant fact, and that is that, under Florida law, every 6 years members of the Florida Supreme Court undergo a retention campaign in which their names are placed before the people. They do not have an opponent other than the record that they have compiled as a member of the court.

In November 1992, Justice Barkett was engaged in such a retention campaign. Many of the issues that I anticipate will be raised during this hearing were the focal points of that campaign. The people of Florida, a State which is very committed to effective criminal justice and a State that takes the attitudes of its judges very seriously—

The CHAIRMAN. I would say conservative on this issue.

Senator GRAHAM [continuing]. Had an opportunity to hear all of the commentary and to evaluate Justice Barkett. After that campaign, 61 percent of the people of Florida determined that it was in their interest and in the interest of the citizens of Florida to retain Justice Barkett. To me, that is one of the most persuasive statements of her judicial qualifications and the public confidence in her integrity.

Mr. Chairman, I have a package of 25 editorials and other articles supporting Justice Barkett. Every major newspaper in Florida, people who know her well, have endorsed her nomination. I would like to include these articles in the record.

The CHAIRMAN. Without objection, they will be included.

[For the articles referred to, see Submissions for the Record following this hearing.]

Senator GRAHAM. As I say, I am aware of the issues that have been raised about Justice Barkett's judicial philosophy. I find it particularly difficult to understand the allegation that she has not carried out her judicial responsibility under Florida's death penalty.

Like the chairman and most members of this committee, I support the death penalty. As Governor, I signed over 100 death warrants. I was concerned with the judiciary in our State, which would have a responsibility in carrying out that law.

Chief Justice Barkett has demonstrated in more than 200 cases her ability to enforce the death penalty. Justice Barkett will fairly carry out the law. Justice Barkett's commitment to the law has made her one of Florida's most competent and trusted jurists. I am confident that those characteristics will make her a superb addition to the Eleventh Circuit Court of Appeals.

Thank you, Mr. Chairman.

[The prepared statement of Senator Graham follows:]

PREPARED STATEMENT OF SENATOR GRAHAM

Mr. Chairman, I am delighted to be here today to introduce Chief Justice Rosemary Barkett, as a nominee for the 11th U.S. Circuit Court of Appeals.

I have had the great fortune of knowing Justice Barkett personally for more than 15 years, and in that time, I have been awed by her intelligence, her compassion, her curiosity of mind and her humility of spirit.

To quote the New Yorker Magazine, Justice Barkett's life is a gloss on the American dream.

She was born in Mexico in 1939. When she was five, her family gave up a prosperous business, emigrated to the United States and settled in Miami to begin a new life.

The Barkett family has always been very large and very close. As you can see, Justice Barkett has a lot of proud family members and friends.

Among the 26 relatives who came today to be with Justice Barkett are her brother Assad Barkett, Jr. of Homestead, Florida; and her sisters, Irma Elder of Detroit, Michigan; Chati Barkett of Homestead; and Carmen Doumar of Fort Lauderdale.

Unfortunately, Justice Barkett's parents couldn't make it from Florida today. Her mother is ill and her father wanted to stay by his wife's side. But this is certainly one of the proudest days in the lives of these two immigrants.

Justice Barkett grew up in Miami. After graduating from high school, she joined a convent and worked as an elementary and high school teacher for several years.

After teaching school for several years, she graduated summa cum laude from Spring Hill College in Mobile, Alabama. Then, after leaving the convent, she attended the University of Florida Law School, where she graduated near the top of her class in 1970.

Justice Barkett worked for several years as an associate and then a partner at Farish & Farish, a West Palm Beach trial law firm. She also worked for a year as a sole practitioner in West Palm Beach.

In 1979, while serving as governor, I appointed her as Trial Judge for Florida's Fifteenth Judicial Circuit, where she impressed her peers, who elected her chief judge of the circuit.

She served in that position with distinction until 1984, when I appointed her Appellate Judge for Florida's Fourth District Court of Appeals.

In 1985, I appointed Justice Barkett to the Florida Supreme Court. She was the first woman to serve on that court and was again chosen by her peers, this time to be Chief Justice in July 1992.

Justice Barkett has received eight honorary doctorates and numerous other awards, including the Lifetime Achievement Award presented by Latin Business and Professional Women and the Hannah G. Solomond Award, presented by the National Council of Jewish Women.

The Academy of Florida Trial Lawyers has established a "Rosemary Barkett Award," which it presents each year to "a person who has demonstrated outstanding commitment to equal justice under the law." The first recipient of that award was Congresswoman Carrie Meek.

Justice Barkett has served on numerous commissions and task forces, including the American Bar Association Steering Committee on the Unmet Legal Needs of Children. She has also been asked by the Florida legislature to chair several major commissions, including one to reform guardianship law and another to study the status and needs of Florida's welfare children.

Throughout her career, Justice Barkett has displayed not only a remarkable combination of intelligence and integrity but also an uncompromising respect for the law. In Florida, she is respected statewide as a judge who treats all people with equal dignity and without arrogance or condescension.

Every six years, Florida's Supreme Court members undergo a retention campaign. In November 1992, Justice Barkett retained her seat by a margin of more than 60 percent. That is one of the most persuasive statements of her judicial qualifications and public confidence in her integrity.

Mr. Chairman, this is a package of 25 editorials and other articles supporting Justice Barkett. Every major newspaper in Florida has endorsed her for this judgeship. I would like to include these articles in the hearing record.

I am aware of issues that have been raised about Justice Barkett's judicial philosophy. I find it particularly difficult to understand the allegation that she has not carried out her judicial responsibility under Florida's death penalty. The facts are Chief Justice Barkett has demonstrated in more than 200 cases her ability to enforce the death penalty. Justice Barkett will carry out the law.

Justice Barkett's commitment to the law has made her one of Florida's most competent and popular jurists. And I am confident that those characteristics will make her a superb addition to the 11th Circuit Court of Appeals.

The CHAIRMAN. Now we will hear from a good friend of this committee and a fellow who we worked with very closely in the last 6 years in judicial appointments, Senator Connie Mack.

Welcome, Connie.

STATEMENT OF HON. CONNIE MACK, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator MACK. Thank you, Mr. Chairman.

I appreciate those comments. There was a lot of action and activity with respect to Federal judges in the State of Florida in the first 4 years, and, as I have expressed on many occasions, I appreciate this committee's responsiveness to the needs of our State.

Mr. Chairman and members of the committee, today I am pleased to join Senator Graham in introducing a fellow Floridian,

Chief Justice Rosemary Barkett, as nominee for a seat on the Eleventh Circuit Court of Appeals.

Last fall, I undertook an in-depth evaluation of Justice Barkett's qualifications for this position, because, frankly, with the exception I think of maybe one occasion, we had not really spent any time together, and I was not really aware of her background.

As a result, I spoke with a number of respected Florida attorneys, both Democrats and Republicans alike. I reviewed her decisions and met with the Chief Justice at length on two separate occasions to discuss her judicial decisions and the nomination.

As I said when I announced my support for the chief justice, I found her to be a decent, caring, experienced, and intelligent jurist, whose personality undoubtedly has been forged from her life's experiences.

As Senator Graham and the Chairman have indicated, Justice Barkett has led a remarkable life. She was born in a small town in Mexico, moved to Miami at a young age, entered a Catholic convent at the age of 17, and became a U.S. citizen at 19. She later graduated from the University of Florida's College of Law and began a distinguished career.

Justice Barkett and I strongly differ on some subjects. I cannot deny that. I believe that people can have strong intellectual differences, but both opinions can be built on reasonable foundations. Even though I disagree with some of the Chief Justice's conclusions, I respect her judgment and her integrity.

As the committee reviews the nomination of Justice Barkett, I ask that it consider these questions: Is she a capable jurist? The answer, in my opinion, is yes. Do her judicial decisions fall within reasonable philosophical bounds? Yes, they do. Is she a judge who has represented the people of my State on our supreme court with integrity and honor? The answer again is yes.

I believe Justice Barkett will bring to the eleventh circuit a demonstrated capacity for intellectual curiosity, for fair-minded and robust debate, and for honesty, all of which will serve our Federal judiciary well. Chief Justice Barkett deserves to be confirmed. I ask the committee to move quickly on the nomination to fill this vacancy on the Eleventh Circuit Court of Appeals.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

I might add I appreciate the way in which you have handled this nomination, Senator. You were forthright with the committee. You did not know enough about the Justice and you wanted to have time to evaluate whether you were for or against. Occasionally, Senators in both parties will say things like that to me, and I think maybe their real reason is to keep things from moving forward. In your case, as you recall, neither of us even questioned your motivation and you did your checking. Had you come back and said you were opposed or supportive, it would not have mattered, because you would have been consistent with what you said, you wanted to take a look. We appreciate that. You always deal with our committee that way and we appreciate it.

Judge, I am going to ask you to stand and be sworn and invite you to make any statement you want, and then we will begin the questioning.

Do you swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you, God?

Justice BARKETT. I do.

**TESTIMONY OF HON. ROSEMARY BARKETT, OF FLORIDA, TO
BE A U.S. CIRCUIT JUDGE FOR THE ELEVENTH CIRCUIT**

The CHAIRMAN. Welcome, Judge, and the floor is yours, if you wish to make any statement. My colleagues, as you know, Justice, they have a thousand other things they have got to do and other hearings, and so we appreciate them being here and that is why they are leaving.

Justice BARKETT.

Justice BARKETT. Thank you very much, Senator.

I do not have an opening statement, but I would like to just say one or two things and introduce the people who are here who have gone to a great deal of trouble to be here.

I have been blessed in two major ways. As you have heard, we are members of a family who came to this country and have been extraordinarily blessed by the opportunities that it has provided not just to me. You all talk about a remarkable life, but if you had the opportunity to hear the stories of the people or individuals who are behind me, you would be probably doubly or triply impressed.

There are two members of my family who are not here, my parents. Once again, if you thought any of our lives are remarkable, I think hearing the factors involved in being double immigrants, having been born in Syria and immigrated in their youth with one or two children—

The CHAIRMAN. What was your first language when you came to America.

Justice BARKETT. Spanish, Senator. My parents were born in Syria, immigrated when they were in their twenties, with one or two children, to Mexico. They spent some 20-plus years, 25 years in Mexico, where I was born and many of my sisters were born, and then immigrated again after the Second World War. So their life is truly remarkable. My father is 94, and my mother is 88. They would have been here, had the cold weather and my mother's failing health not precluded it, and then I surely would have worried about any hostile question that may have been asked, I have to tell you.

Senator HATCH. You think you would worry, you can imagine how we would feel. [Laughter.]

Justice BARKETT. In March, they will be celebrating their 75th wedding anniversary, and I think their story is ten times more remarkable than anybody that is here.

My father is one of many brothers and cousins who immigrated here, and their descendants are represented in the people who are here in this room. We began approximately 26 years ago to have a family reunion in Vero Beach, FL, which is in the middle of the State. Many of my family members are from Jacksonville, and many are from Miami. We meet in the middle, and there has not been a year, I do not think, where the numbers of the immediate family, my father's brothers and his cousins and their descendants, do not number in excess of 100.

Over the 26 years that we have been doing this, we have become much closer than most families. Our cousins have blended to be extra sisters and brothers, our aunts and uncles are like surrogate parents who feel the great responsibility of correcting you when your parents are not around, and many times when they are around, so you are corrected six or seven times for the same offense.

The CHAIRMAN. I know the feeling.

Justice BARKETT. I have friend here. In my family, there are not outsiders. My family accepts our friends, those of all of us as part of the family, so that everybody that is here to me is a member of my family.

I also have to say one other thing before I just read their names to you, because they have made a great effort to come from Florida in the winter, and that is, lest the committee think that its importance is exaggerated, this family uses every—we do this for graduations, birthdays and every other event, where—

The CHAIRMAN. Use up all those frequent-flyer tickets?

Justice BARKETT. Well, we come together every time an occasion even remotely warrants it, where there is any pain that might occur or any celebration. I know that everybody hopes it is going to be the latter in this instance. So I appreciate your letting me take a couple of minutes to read the names of the members of my family who have made the effort.

People ask you if you are nervous here, and I am not. The only emotion that I feel today is just a tremendous gratitude for the people that are here.

The CHAIRMAN. Take your time, Justice.

Justice BARKETT. It is just really neat that they did this. My sisters, of course, Irma Elder and Chati and Carmen Doumar have been introduced, as well as my brother Assad Barkett. I should not tell you this, but he is approximately 20 years or so older than I am, and his children are sort of like my brothers and sisters, but his wife, who is also not here, is helping take care of my parents and is not well enough to have made the trip, is as much a sister as any of my sisters have been, and I wish that she were here.

I do not want to take up a lot of time, but I just feel like I need to read their names.

The CHAIRMAN. Just take your time. This is one shot, just the one shot you have.

Justice BARKETT. I will not bore you with how they are related, but let me just go down the list and say that Steve Doumar is here, Johnny Barkett and Sybill his wife, my niece Mansura Crump, my cousins Georgia Abdelnour and Mary Barket and Julia Barket, my aunt Lil Barket, Frances Joseph and Louise Korey and Neddie Lewis, Richard Crump, Robin Marques and Michael Marques—I hope little Michael made it—Lori Nation, and my grand-nephews, we are like three or four generations, my nephew Johnny's children are here, Johnny Barkett and Dee, and I guess Leslie got to stay home.

The CHAIRMAN. Who is the youngest one in the group? There you go. What is your name? OK, John. In these hearings, the youngest member of the family in attendance has the free run of this place. Seriously, if you want to get up and head back here, I think we

have got some candy and stuff back here. You can do everything but question, and occasionally we allow that to happen. [Laughter.]

Senator HATCH. Yes, we will consider that.

Justice BARKETT. Thank you, Senator.

Susan Albert, Kristie Milo, Saralyn Korey, Katie Korey, Dee Barkett, John David Baxton, Fr. Michael Soukar. I have to then go into my extended family. I could not be more pleased to have members of my staff who are here: Chet Kaufman, Professor Steve Guy, from Florida State University's College of Law. I almost said the wrong name.

The CHAIRMAN. I understand how that could be dangerous in Florida.

Justice BARKETT. Yes, in my State, especially.

Debbie Hulls, who is my assistant judicial assistant, who has become like another sister to me; my friends Gail Nelson, Alexander DeBlassio, Jamie Kevees, Janet Studley should be here, Doug Hughs, Kim Meyers, Scott Rogers, Nina Weinstein, Gail Nelson. Of course, I could not be more delighted to have with me, who has been of enormous support, Chesterfield Smith, whose example has been——

The CHAIRMAN. We all know Chesterfield. Welcome, Chesterfield. It is good to have you back.

Senator COHEN. Mr. Chairman, could I inquire, are those books the family genealogy that you have in front?

Justice BARKETT. No, sir. They would be much more extensive.

Senator MOSELEY-BRAUN. Actually, I was going to ask the Chairman if he would inquire which relatives are from Illinois.

The CHAIRMAN. There is bound to be someone from Illinois.

Justice BARKETT. I do. Lori, where are you?

The CHAIRMAN. There you go. Would you report after school, please? [Laughter.]

Justice BARKETT. Thank you, Senator. I just want to say thank you to all of them for coming. Everything that I have done right in my life has been an emulation of the things they taught me, and whatever I have done wrong I take full responsibility for.

Thank you for your patience in letting me do that.

The CHAIRMAN. It is a great honor. One of the things that I think we so seldom pay attention to, we are here in these halls and in this great institution, which is not because on occasion of our conduct and because on occasion of the nature of the system is not always looked to as such a great institution, but it truly is a phenomenal honor for anyone to be nominated to the Court of Appeals, and this is an occasion that warrants your presence.

I hope those of you who do not know Washington well, I know you are anxious to go back because of the weather, but I hope you get a chance to actually feel the ambience of this great city and these buildings and these halls that are yours. It is worth seeing. It is worth taking the time. It is a reflection of the great institutions that were wrought a long time ago.

I have only one more question relating to genealogy. Of the 16, what number are you?

Justice BARKETT. I am second from the bottom, Senator.

The CHAIRMAN. Second from the bottom. One last question, the only other question I will ask you about your previous occupations:

When you were a nun in the Sisters of St. Joseph, were you issued a clicker?

Justice BARKETT. No, Senator, just a ruler to rap appropriate knuckles. I hope it will not be necessary this morning. [Laughter.]

The CHAIRMAN. My ears were never this long before I went to Catholic school, and my small hands were in fact not as rough on the back before I attended Catholic school, so I understand.

If I ask you anything or if I—the press will know I have had a flashback, if I start saying, “yes, sister,” or “no, sister” to your responses, but I will try not to do that. I will try to remember my role.

Justice BARKETT. Senator, there were, I am told, some judges on the fifteenth judicial circuit when I was chief judge there who sometimes had the tendency to refer to me as “mother superior.” [Laughter.]

The CHAIRMAN. Let me get serious for a moment here. Justice Barkett, in your 8 years on the Supreme Court, you have upheld the death sentence in more than 200 cases. As our research shows, 200 times death cases have come up to you involving roughly 150 defendants. Is that correct?

Justice BARKETT. I am told that the numbers are closely to approximately 275 or 276 times that there has been an affirmance of the death penalty in which I have voted with the majority. If you are counting only individuals, rather than double cases, it is somewhere in the neighborhood of 150 defendants to 200. That is a difficult number to ascertain, because a lot of defendants have the same name, but somewhere in the neighborhood of 150 to 200 defendants, I believe.

The CHAIRMAN. So Florida has a death penalty statute, correct?

Justice BARKETT. Yes, it does, Senator.

The CHAIRMAN. Can you tell me whether or not there is discretion on the Florida statute for a judge to make a judgment, a trial court judge to impose the death penalty where the jury may come back with a life sentence after conviction? I know you are not now a trial court judge.

Justice BARKETT. Yes, Senator.

The CHAIRMAN. But tell me what discretion a trial court judge in Florida has relative to the death penalty as a sentence.

Justice BARKETT. In the Florida statutory scheme, the jury makes a recommendation to the judge and the judge then has the option of following the recommendation of life imprisonment or of imposing the death penalty.

The CHAIRMAN. Even if the jury does not recommend death?

Justice BARKETT. Yes, Senator. But prior to my joining the court, the court had addressed the question of under what standards can a judge overrule a jury’s recommendation of life, and the standard is a very stringent standard, and the cases interpreting that standard are also very stringent, so that the court in a case called *Tetter v. State* has said that only when no reasonable juror could possibly have imposed the death penalty, may a trial court judge reverse the jury recommendation of life and impose a death sentence, and that has been the continuing law of my State on that question.

The CHAIRMAN. Reasonable judges, I suspect, as reasonable members of the Senate, can disagree with some of the judgments

that you have made or not made in those 275 death cases. As I understand, among the more than 600 death penalty appeals you have confronted in the Florida State Supreme Court, there may be cases in which you have upheld the death penalty that I or others here may not have, and, likewise, there may be cases in which you have voted to reverse the imposition of the death penalty, imposing life instead of death which may be disagreed with by members of the committee, including me.

I am not sure, quite frankly, there is much value in pointing out individual cases, so long as the overall record demonstrates willingness to apply the law. Now, in your approach to judging, how do you see your job of interpreting our Constitution and the laws of the State of Florida and reviewing their application to the facts? That seems to me to be the question that I want to know about how you approach the business of judging.

In that regard, I would like to discuss with you three areas: First, the difference between your role as a State Supreme Court Justice and your role on the court of appeals; and, second, the role of precedent in judging as you view it; and, third, the respective role of courts and legislatures in determining the meaning of the statute.

You currently serve as Chief Justice of the State of Florida, the highest court in the State of Florida, the ultimate arbiter of disputes arising under the State's Constitution and laws. I have reviewed many, though certainly not all, of the 3,000 opinions you have written personally, and the 12,000 cases in which you have participated during your 8 years on the court. I might add that you have kept our investigative staff very busy, because of the number of cases that you have written and/or participated in.

In many of those cases, litigants invoked provisions of both the Federal and State Constitutions and State laws. How would you compare and contrast your role as a Chief Justice of the State supreme court with the role you will assume, if you are confirmed, on the Eleventh Circuit Court of Appeals?

Justice BARKETT. Senator, as a member of the court of last resort in a State, it is the State supreme court's job to look and act, in our State, Florida, within the context of Florida's Constitution and Florida's law and Florida precedent, which in some instances may be different from that of the Federal precedent or the Federal Constitution. We, of course, must apply the Federal Constitution, but State Constitutions may have more protections than the Federal Constitution, and it is in the context of Florida law where a Florida Supreme Court justice operates.

In the Federal system, of course, you would not be looking at the case in front of you within the context of the ambit of the Florida Constitution or the Florida laws. You will, of course, be looking only to the Federal laws and be guided by the precedent that the U.S. Supreme Court has established, and I of course will do that.

The CHAIRMAN. When your court, the Supreme Court of the State of Florida, construes State statutory or constitutional provisions, are you bound by the precedents of the U.S. Supreme Court?

Justice BARKETT. We, of course, are, but we may have additional requirements under Florida's Constitution.

The CHAIRMAN. I understand what you are saying, but, for the record, give me an example, if you can think of one, where the Florida State Constitution has an additional safeguard built in.

Justice BARKETT. For example, the voters in my State very recently passed a constitutional express right of privacy which is delineated just exactly that way. The people of the State of Florida have a right of privacy, the people of the State of Florida have a right to be let alone and—

The CHAIRMAN. So you do not have to worry about unenumerated right of privacy in the State Constitution?

Justice BARKETT. The people of the State of Florida enumerated their right of privacy very explicitly, so there would be no question, Senator, I believe.

The CHAIRMAN. So in that case, you may very well—and I am not looking for a hypothetical, but it is possible that you could conclude that, for a particular circumstance, there was not a right of privacy guaranteed in the Federal Constitution on a particular issue, but may very well be enumerated in the Florida State Constitution? You would not be in any way violating the Federal Constitution by upholding a more stringent or a more clearly articulated right set out in the Florida Constitution?

Justice BARKETT. I would not be interpreting the Florida Constitution or applying Florida law in a Federal context, except in those cases where I am required—

The CHAIRMAN. I mean now, as a Florida Supreme Court Justice.

Justice BARKETT. That is correct, Senator. For example, in a privacy case, it would not be necessary to deal with any Federal constitutional issues. We look to them, of course, for persuasiveness and for guidance, as we do to many other courts.

The CHAIRMAN. As the Chief Justice of the Supreme Court of the State of Florida, in a matter that just deals with Florida statute, the Florida Constitution is not in any contravention of any Federal constitutional interpretation. Are you able to, in your view, along with your associates on the bench of the supreme court, overrule standing precedent of the Florida Supreme Court?

Justice BARKETT. Of course, Senator. It is the function of the court of last resort to do so. Of course, on the Eleventh Circuit Court of Appeals, assuming I have the opportunity to serve there, that would be a job reserved for the U.S. Supreme Court.

The CHAIRMAN. Put another way, if you strongly disagree with a U.S. Supreme Court ruling, as an appellate judge on the eleventh circuit, and you were convinced, though, that the facts were clear, the circumstances were clear that it fit clearly on all fours within the context of a recent or the standing Supreme Court position on a particular issue, even though you disagreed with the reasoning of the Supreme Court as to how they reached that conclusion, what is your requirement under your oath of office to do?

Justice BARKETT. To follow the law, Senator. That is what I have done and that is what I anticipate I will always do as long as I am a judge.

The CHAIRMAN. I am sorry to keep focusing on this, but it is important. As a supreme court justice in the State of Florida, in the literal sense, you need not follow the law as interpreted by your colleagues the day before or 10 days before or 30 years before. You

can sit there and say I think the reasoning was faulty in the case of *Smith v. Jones*, which is the law of the State of Florida, as interpreted by the Florida Supreme Court as it relates to the Constitution of the State of Florida, and you can say I think that was faulty reasoning, it stood for 30 years or 30 days, I am going to vote to overrule that case. So that is, in the literal sense, not upholding the law. You are rewriting the law. You are redefining the law, not rewriting, redefining the case law.

As an appellate court judge, is it within your province, under your oath of office, if you are sworn in, to similarly act with regard to U.S. Supreme Court ruling with which you believe there is faulty reasoning and a misapplication of the law?

Justice BARKETT. As a member of the court of last resort in the State, you are permitted within the ambit of your authority and it is appropriate to on occasion reverse your prior precedent. One does not do that lightly, Senator, and it is not a regular occurrence, obviously. On the Eleventh Circuit Court of Appeals, a judge does not overrule the precedent of the Supreme Court or even of its own court, barring, of course, those rare instances where there might be an en banc reconsideration of an issue.

The CHAIRMAN. I thank you. My time is up.

Senator Hatch has questions and he is next, and they asked me to wait while he comes in from the reception room in a moment.

Senator COHEN. I would be happy to proceed in his absence, Mr. Chairman.

The CHAIRMAN. As they say, when I look at my colleagues on the Republican side and the senior member is waiting to ask questions, there is an expression a former Republican leader used to have, "I ain't got no dog in that fight," so I am going to wait and let the senior member ask his questions.

Senator COHEN. The senior dog has just arrived. [Laughter.]

Senator HATCH. I have been called worse, I want you to know.

We welcome you to the committee, Justice BARKETT.

Justice BARKETT. Thank you, Senator.

Senator HATCH. We appreciate what a wonderful family you have. I have met a number of them and I have been called by them, and I truly believe you have a wonderful family.

What I would like to do is go through some preliminary things and then start and do as much as I can before I turn to our colleagues on the committee.

Is it not the case that there will be many issues which will come before you, as a circuit court of appeals judge, if confirmed, which are not directly governed by precedent?

Justice BARKETT. I suppose, although candidly, Senator, most issues will have some analogous precedent or some prior expressions.

Senator HATCH. I believe you will have many cases of first impression before you. But you are right, there will be a lot of cases that involve precedent which you have to consider. For example, Congress enacts new laws all the time which require initial consideration in the lower courts, starting with the district court in most cases. Some of them do come directly to the circuit courts, I imagine. But State legislatures enact laws all the time that also are subject to challenge on constitutional grounds. So you will have cases that really will be first impression cases.

But is it not also true that there will be other cases in which the scope, the breadth or narrowness of existing precedent will be disputed? You have had that in your experience as a supreme court justice. As you know, the Supreme Court grants review in only a tiny fraction of all court of appeals decisions. So it is fair to say, is it not, that Federal courts of appeals have the final word in almost all the cases that really come before them?

Justice BARKETT. They have a substantial impact, I am sure, Senator.

Senator HATCH. They do. In light of all of this, it is also fair to say that a Federal appellate judge's philosophy or approach to judging would naturally be important to us on this committee and to everybody else, for that matter. You would agree with that?

Justice BARKETT. I agree that their approach to judging is. I am not sure I understand what you mean by philosophy.

Senator HATCH. I understand that. It is not just the Supreme Court justice's judicial philosophy that is significant. Lower court decisions cover so many issues, from crime to obscenity to privacy to civil rights and so on, that those particular decisions often become the law of that particular circuit, and it is common to have split-circuit opinions, where one circuit may differ from another circuit. So there are differences in philosophy, differences in precedent, differences in cases of first impression, all of which you have had to deal with to a limited degree as a justice on the Florida Supreme Court, but which you will have to deal with to a much larger degree as a judge on the circuit court of appeals.

Justice BARKETT. Yes, sir.

Senator HATCH. Let me just turn briefly to the general subject of opinion writing. Part of the reason that appellate judges embody their decisionmaking in written opinions is to provide guidance to lower courts and parties in future cases. I am sure you would agree with that.

Justice BARKETT. Yes, sir.

Senator HATCH. And part of the reason is to satisfy the parties and the public that the court is in fact engaged in reasoned decisionmaking, correct?

Justice BARKETT. Yes, sir.

Senator HATCH. So you would agree, I trust, that it is important for judges to explain their thinking, especially appellate judges, as they decide these cases?

Justice BARKETT. Yes.

Senator HATCH. I want to ask you some questions about your judging under the equal protection clause of the Federal Constitution. This is extremely important to me and I think to almost anybody who is concerned about constitutional decisionmaking.

Let me just first ask you whether or not you agree with Justice Blackmun's formulation of the test for deciding cases under the equal protection clause or with equal protection clause implications. Writing for the court in a 1992 case, *Nordlinger v. Hahn*, he said, "This Court's cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes existence of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the equal protection clause requires

only that the classification rationally further a legitimate State interest." Do you agree with his articulation of that?

Justice BARKETT. I agree that Justice Blackmun said that, yes, Senator.

Senator HATCH. But do you agree with what he said?

Justice BARKETT. I agree that the law of equal protection is what has been said by the U.S. Supreme Court and the Federal courts, absolutely, and I would follow that precedent without any quarrel.

Senator HATCH. He basically defined the rational basis test in that statement?

Justice BARKETT. Yes, sir.

Senator HATCH. And that law has been settled for at least the last few decades?

Justice BARKETT. I do not have any question about that, Senator, on the Federal side, understanding that our requirements under the Florida Constitution and under Florida cases differ slightly.

Senator HATCH. Sure.

Justice BARKETT. Or somewhat.

Senator HATCH. Justice Blackmun also explained in the *Nordlinger* case how the rational basis standard is to be applied. As he reiterated, it is a well settled test.

Justice BARKETT. Yes.

Senator HATCH. He said, "The Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the government decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." Do you agree with that statement?

Justice BARKETT. Yes, sir.

Senator HATCH. Indeed, in 1980, in *USRR Retirement Board v. Fritz*, the Supreme Court noted that so long as there are plausible reasons for the legislature's action, the court's inquiry "is at an end." Indeed, citing a 1960 decision, the Court there also made it clear that it is irrelevant whether these plausible reasons were articulated by the legislature or even actually underlie the legislation. That is how deferential the standard is for elected representatives to make these laws.

And as the Supreme Court has stated, this standard "is a paradigm of judicial restraint," because it protects against courts using equal protection as—and it is an interesting quote—"a license to judge the wisdom, fairness or logic of legislative choices," as distinct from the constitutionality of those choices. That, of course, is the *FCC v. Beach Communications* case.

So I wanted to go through just to establish that we are both talking on the same wave length, when we discuss these equal protection cases.

What I would like to do is just go through some of the cases. I am not going through them from the standpoint that I agree or disagree with the outcome, because that is almost irrelevant.

Justice BARKETT. I understand, Senator.

Senator HATCH. I am going through them with regard to judicial reasoning and philosophy. Let me just turn to your dissenting opinion in *University of Miami v. Echarte*. This is a 1993 case. In that

case, the Florida Supreme Court ruled that a State law placing a monetary cap on noneconomic damages—that is damages for pain and suffering—in medical malpractice cases did not violate equal protection.

The Florida Legislature had found that there was a financial crisis in the medical liability insurance industry, that if the crisis was not abated, many providers of medical care would “be unable to purchase liability insurance and many injured persons [would] therefore be unable to recover damages,” that the size and frequency of very large claims was the cause of these problems, and that damages for noneconomic losses were being awarded arbitrarily and irrationally.

Now, you dissented on a variety of State law grounds, but you also dissented on the ground that the caps on noneconomic damages, in your view, violated the equal protection of the U.S. Constitution. Now, I am not concerned here with the merits of caps on noneconomic damages in medical malpractice cases or medical liability cases, as I prefer to call it.

Justice BARKETT. I understand.

Senator HATCH. My concern goes to your use of the Federal equal protection clause as a basis for a court to strike down such caps, because it seems to me to be clearly at odds with settled Supreme Court precedent on the deference to be given legislative bodies under that clause.

Now, your opinion says, “I fail to see how singling out the most seriously injured medical malpractice victims for less than full recovery bears any rational relationship to the legislature’s stated goal of alleviating the financial crisis in the medical liability insurance industry.”

Now, it seems to me that the rational relationship between the means and the goal is self-evident, namely, limiting the award of enormous noneconomic damages can be rationally expected both to reduce malpractice premiums which are passed on to patients by doctors, and to help alleviate the financial crisis in the medical liability industry.

Now, I can understand someone disagreeing with the legislation as a matter of policy. I may or may not agree with that myself. But given the legislature’s judgement about the medical malpractice crisis in the State of Florida, where it is even difficult to get obstetricians to deliver babies in certain areas, how can you as a judge use the Federal Constitution’s Equal Protection Clause to strike down that law as irrational? And how can it fairly be said that the cap on noneconomic damages, to use your terms, can only be called arbitrary and bears no rational relationship to alleviating the medical malpractice industry?

Justice BARKETT. I think my answer really has to refer or incorporate much of what I said to Senator Biden, Senator Hatch, in the sense that when you are sitting as a State Supreme Court justice, you look at these cases totally within the ambit of Florida law and Florida cases. That particular case was argued primarily under the auspices of being denied access to courts.

There is a landmark case in Florida called *Kluger v. White*, which said that before a right of access to courts can be restricted, a reasonable alternative must be provided or the legislature must

show an over-powering public necessity for abolishing that right, and that there is no alternative means of meeting that public necessity. That is a very strong standard, and my court has—this has antedated my appearance on the court.

The argument in the *Echarte* case about limiting economic damages, in essence, really basically was an argument under the access to courts provision, which is also included in our Constitution expressly, and it is not in the Federal Constitution.

Senator HATCH. I understand that.

Justice BARKETT. If I can just kind of get the whole tenor out, having said that, we also at the same time have a much different standard in evaluating equal protection claims under the Florida Constitution by case law. Our court's analysis of the rational relationship test is a much more stringent test and permits judges, on a different standard, to review the relationship between the two.

I grant you that I used the term "Federal Constitution," but if you look at my dissent in that case and that I think of Justice Shaw, with whom I concurred, the analysis is totally using Florida cases under a Florida system, and if the concern is whether I would apply this analysis under the Federal Constitution, I of course could not, because the law is very different, as you have laid it out to be. That was basically viewed as a *Kluger v. White* access to courts question, which requires, when a cause of action is taken away from a plaintiff, that it has to be on the basis of an overwhelming necessity that the legislature must show, and that there is no other reasonable alternative.

The CHAIRMAN. I would ask unanimous consent, since the Senator's time is up, to allow him to finish this line of questioning. There is going to be a vote at 11:25, so I am going to leave and go vote, so we will not have an interruption. I might suggest that maybe those—

Senator HATCH. It may be important to just finish this line, so we will get it out of the way.

Justice BARKETT. I would appreciate it.

Senator HATCH. When I read the case, you relied on equal protection language, the Federal equal protection language, and, frankly, I could not see how anybody—you are saying if you had to rely on Federal equal protection, the decision might have been totally different?

Justice BARKETT. No, I used the term Federal Constitution. I appended it to the Florida Constitution and the Federal Constitution. We do use terms of rational relationship, but our test, our ability to apply the test differs from the Federal court's ability to apply the test.

Senator HATCH. You see why I was concerned?

Justice BARKETT. Absolutely.

Senator HATCH. Virtually every State in Federal law classifies people in one way or another and draws distinctions between people.

Justice BARKETT. I understand.

Senator HATCH. For this reason, the Federal equal protection clause is one of the most powerful tools for a judge to wield in order to override judgments committed under our system to the people or their elected legislators.

Justice BARKETT. I have no problem applying the Federal law on equal protection or anything else, as a member of the Eleventh Circuit, should you permit me to serve in that capacity, Senator.

Senator HATCH. That is fine.

Let me just go a little bit further here. You had several State court grounds in that case. It did not have to reach out to the Federal equal protection clause, and you are saying here that perhaps you shouldn't have.

Justice BARKETT. The only reaching out was including the phrase "Federal Constitution," I should not have done that. The analysis, the cases that I relied on, the cases that the other judges relied on were exclusively Florida cases. I do not think you will see one Federal case cited in my dissent, Senator. I do understand the difference and want to reassure you that there is no problem in applying the Federal standard.

Senator HATCH. I appreciate that. The reason it jumped out at me when I read the case, you write "I agree with Justice Shaw that the statutes in question violate article I, section 21 of the Florida Constitution. I also believe the statutes violate the right to trial by jury and the equal protection clauses of the Florida and U.S. Constitutions."

Justice BARKETT. I understand.

Senator HATCH. I have concerns about another one of your equal protection opinions, and that is *Shriners Hospital v. Zrillic*. I guess I am pronouncing that right. It is a 1990 case.

Justice BARKETT. I have it here, but I did not get a chance to look it over.

Senator HATCH. You may be the first witness in the history of this committee who has been given the cases in advance by the committee. But it came up in one of our prior hearings, and I thought it was a good idea, so I decided to give you all those cases and hopefully they will be helpful to you and helpful to us.

Justice BARKETT. Thank you, Senator.

Senator HATCH. In that case, the Florida statute permitted a direct heir to cancel a gift to a charity made in a will that was written less than 6 months before the author of the will, the so-called testator, died. In short, the statute operated to guard against undue influence by charities with people who are making wills.

You wrote the opinion for a divided court striking down the statute. One of the grounds on which you struck it down was the Federal equal protection clause. My concern here again is not with the wisdom or lack of wisdom in this statute. I am not going to judge Florida law on that basis. Rather, I am concerned with the reasoning by which you use the Federal equal protection clause to invalidate it.

In that case, you stated: "Equal protection analysis requires that classifications be neither too narrow nor too broad to achieve the desired end. Such under-inclusive or over-inclusive classifications fail to meet even the minimal standards of the rational basis test."

Now, your opinion proceeds to hold that the statute is under-inclusive, because it protects against only one type of undue influence on a person making a will, that is influence by charitable organizations. Moreover, you said that the statute is over-inclusive, because

it would render voidable many donations not tainted by undue influence. Are you having any trouble finding that case?

Justice BARKETT. No.

Senator HATCH. We will get it for you.

Justice BARKETT. I have it.

Senator HATCH. Your opinion further states that the 6-month period set forth in the statute is irrational. Now, your words are "there is no rational distinction to automatically void a devise upon request when the testator survives the execution of the bill by 5 months and 28 days, but not when the testator survives a few days longer." Would what I have just said be a fair summary of your equal protection holding?

Justice BARKETT. I do not dispute it, Senator. Again, I frankly was wondering why you included Shriners Hospital, because I could not figure out what interest you all would have in it.

Senator HATCH. It's the equal protection clause, because let me just bring it down to where it is. If your interpretation of the equal protection clause as written in the prior case we discussed—but you have explained that—and as written in this case is the law, that means the judges can do whatever they want to do. They do not have to abide by any law. They can just use the equal protection clause to justify any decision that they make, based on their own personal, political or policy differences with the elected representative statutes.

Justice BARKETT. I understand the concern, Senator, but I do not think it is justified in my case. And with reference to Shriners Hospital, the thrust of that opinion again was grounded in the Florida Constitution, which is very specific about providing the right to acquire, possess and protect property, and it goes on to deal with inheritance issues and so forth, and reposit in individuals the right to dispose of their property however they want to.

Again, when I am thinking equal protection, generally I am thinking in terms of the prior case law of my own court in my own State, which differs somewhat, but—

Senator HATCH. You can see why I am upset with it, because—I am not upset with you, I mean you have a right to feel the way you want to. On the courts, we are really upset, when judges then start using the equal protection clause to justify any policy change they want, regardless of what their elected representatives do. Unfortunately, that has been happening all over this country, and it has been happening in a variety of ways.

When you state in the case—and this is on page 69, in the right column, right under IV—"We also find that section 732-803 violates the equal protection guarantees of Article I, Section 2 of the Florida Constitution, and the Fourteenth Amendment of the United States Constitution."

Justice BARKETT. Senator, I understand your concern. As I said, I do not think it is warranted in my case, and I think if you take a look at my entire record and my view of the separation of powers, I think you will find that I have fairly consistently attempted to recognize that policymaking is not within the purview of the judiciary, I do not believe in reading things into statutes.

I, in fact, given the choice of it is something substantive, I vote to find it unconstitutional and send it back to the legislature,

where, in the give and take of legislative debate and consideration of issues, which judges do not have the opportunity to do, they would have the opportunity to fix the statute so that it would pass constitutional muster, not the way judges want to fix it, but the way legislatures ought to fix that. I have taken that position fairly consistently in my judicial career.

Senator HATCH. That statement pleases me, and I have to say that it is consistent with what I think is good judging. But my concern is that your application of the rational basis test in this case collides head-on with several principles that earlier Supreme Court cases—let me just mention some of those precedents and ask you to respond to those concerns.

Senator SIMON. I do not mean to cut off Senator Hatch. I would like to get in a few questions. I will not be able to return after the vote.

Senator HATCH. I hope it will not take me too long. The vote just started?

Senator SIMON. We have a vote on right now.

Senator HATCH. I have to finish this one point. Let me see if I can hurry through this and give you the time to answer a few questions.

The Supreme Court has specifically held that a classification does not violate the equal protection clause simply because it is "to some extent under-inclusive and over-inclusive," and that is *Vance v. Bradley*.

Justice BARKETT. I have no problem following the Federal law, if and when I am in the Federal system, and will certainly not apply any Florida precedent to situations in which there already is Federal precedent, Senator. I can assure you and the American people of that.

Senator HATCH. Well, I appreciate that comment, but I am troubled by your ruling that the 6-month period is irrational, simply because it produces different results, even under Florida law, when the testator survives 5 months and 28 days or maybe a few days longer, or 6 months and 1 day. Virtually the same objection could be voiced against every time limit in the law, including, for example, a 1-year statute of limitations period or limiting protection against age discrimination to those who are 40 years of age or older. Such time limits are, by necessity, inherently and inevitably arbitrary.

Justice BARKETT. The only thing I can suggest, Senator, is that you read the entire case in its context and the history of both of the equal protection cases in Florida, as well as the Constitution upon which frankly I was focused in that case more than anything else, and that is the right of ownership over property and the ability to dispose of it as one wishes, that is the testate.

Senator HATCH. I understand. But can you show me any place in Federal authority that would justify that decisionmaking?

Justice BARKETT. All I can tell you there is, whatever the Federal authority is, that is what I will be guided by in the eleventh circuit court of appeals, assuming I have the opportunity to serve there. I do not think there is any question of that, and I do not think there is any question really, either, of my applying legislative mandates wherein I have questioned the wisdom of them.

There have been many opportunities to have expressed a view that the law was unwise and, therefore, we were going to overrule it. But I do not think it is in the prerogative of judges to do so. I have not done so, in my judgment, in the face of unwise laws, and I do not intend to do that in the future.

Senator HATCH. I am not trying to give you a rough time, but these are really important positions. The circuit court of appeals is very, very important. We have established that they decide finally most cases in our society. It is not your position, is it, that your obligation to follow the Federal Constitution and Federal laws and U.S. Supreme Court precedent is different as a U.S. court of appeals judge than it would be as a justice on the Florida Supreme Court?

Justice BARKETT. I am suggesting that the ambit is different. When I am looking at a Florida case, I am looking at the Florida law and interpreting and talking about equal protection. I am looking at the Florida constitutional requirements, and I am looking at the totality of the way the arguments are presented and framed.

In the Federal system, they would not be presented and framed or involved with a Florida constitutional provision that is going to let you look at things focused mostly on the Florida constitutional provision, as opposed to some of the ancillary issues that are raised.

Senator HATCH. Can you cite any precedents under Florida law that would allow you to use the equal protection under that Constitution in this broad a fashion, so you strike down basically the classifications by the State legislature?

Justice BARKETT. I can read to you the language in a case, it is in the 1970's: "In order to comply with the requirements of the Equal Protection Clause, statutory classifications must be reasonable and nonarbitrary, and all persons in the same class must be treated alike. When the difference between those included in a class and those excluded from it bears a substantial relationship to the legislative purpose, the classification does not deny equal protection." When it does, then it does. There are other lines of cases where the analysis is very different from the Federal analysis, as it were.

Senator HATCH. I want to finish this line of questions, because it is important.

Senator SIMON. I do not mean to cut you off, but I am going to have to get a few things in here.

Senator HATCH. I think I can do it in a couple of minutes, if we do not get into an argument.

Senator SIMON. Two minutes and then I am going to take over.

Justice BARKETT. What do I do?

Senator HATCH. You just be yourself. We will handle this one way or the other. [Laughter.]

My concern naturally about your rationale in those two cases—and there are only two, and I have a number of others, but you are answering these matters—my concern about your rationale in this case is it goes far towards transforming rational basis scrutiny into strict scrutiny, which is very, very important.

Indeed, if applied consistently, it seems to me that there are few laws that could survive the test that you set forth in that particu-

lar case. Of equal concern is the prospect that the test would not be applied consistently, but would be used arbitrarily and selectively to strike down particular laws that any judge can say is overbroad or unsound.

If I was to illustrate it, I would compare your opinion in this case to your opinion in *LeCroy v. State*. In that case, the six other Florida Supreme Court justices voted to affirm the death sentence for a murderer who was 17 years and 10 months old at the time he committed two brutal first-degree murders. In your lone dissent, you took the position that the eighth amendment ban against cruel and unusual punishment prohibits the execution of a person who was under 18 at the time of his offense. In short, you took the view that the Constitution imposed a bright-line age minimum of 18 for offenses that can result in the death penalty.

Now, let me note incidentally that the U.S. Supreme Court subsequently rejected the position that you took. For present purposes, however, I would like to simply apply the methodology of your Zrillic opinion to the position that you took in *LeCroy*. If you apply the Zrillic methodology, one would say that the bright-line age minimum of 18 is both under-inclusive and over-inclusive. It is under-inclusive, because it fails to protect from capital punishment those persons over 18 who, in the language of your *LeCroy* dissent, "have not fully developed the ability to judge or consider the consequences of their behavior."

Senator SIMON. I hate to cut off my colleague from Utah. I have great respect for him, but he has used his 2 minutes and I have to get a few minutes in here before I vote, and I am not going to be able to come back.

Senator HATCH. All right.

OPENING STATEMENT OF SENATOR SIMON

Senator SIMON. Let me just comment briefly: You have your critics, as you know, Madam Justice. I read, for example, the Washington Times that says, "The Clinton administration would be wise to withdraw her name before her radical views become an embarrassment."

Then I read the newspapers in Florida, where they know you, and I get a totally different message. Here is the Orlando Sentinel: "Florida Chief Justice Rosemary Barkett, tapped to be a Federal appeals judge, is hardly soft on crime, as her opponents say," and these articles they keep coming in.

In regard to the case of someone under the age of 18, I think it is important to emphasize what my colleague Senator Hatch said. The Supreme Court ruled subsequent to, not prior to, your ruling. And let me just add, as one who opposes the death penalty because it is a penalty reserved for people of limited means, I also oppose the death penalty for people under the age of 18. There are only five nations on the face of the earth that in recent years have legally executed people under the age of 18. Three of them are Iraq, Iran, and the United States. We are not keeping the best of company in some of these things.

But the question before us is not the death penalty. You have in over 200 cases upheld the death penalty. The question is whether you are going to uphold the law.

I remember when Bill Barr sat in that seat, as a nominee for Attorney General and one of my colleagues, I believe it was Senator Metzenbaum, asked him what he thought of the *Roe v. Wade* decision, and he said very candidly, "I think it was a bad decision, but my job is to uphold the law." And I gather that that is precisely the position that you take. I might add that I think this committee unanimously approved Bill Barr, no matter which side of the *Roe v. Wade* decision we were on and I think we ought to do the same for Justice Barkett, no matter which side of the death penalty we are on.

Am I misconstruing your position?

Justice BARKETT. No, Senator, I think you are construing it correctly. When I decided *LeCroy*, the U.S. Supreme Court in *Thompson* had itself put on a bright-line rule saying that you could not execute anyone under 16 years old. They left open the question of whether or not it would be cruel and unusual punishment to execute someone between the ages of 16 and 18, and I took the position that, for the reasons that you can read in my dissent, which I think are legally supportable, that the open question of the 18-year-old should be decided on the basis of finding it cruel and unusual punishment.

Subsequent to that time, the U.S. Supreme Court spoke in *Sanford*, and all I can tell you is that I obviously will apply the precedent of the Supreme Court on the Eleventh Circuit, should I serve, and as I have done on the Florida Supreme Court.

I also have to take pains to add that the selective use of cases is, in my judgment, unfair, when one recognizes that I am—I think my critics sometimes are using selective cases to suggest that I am not in the main stream, but my record reflects otherwise, when you recognize that my court is unanimous approximately 70 percent of the time, that I have been in the majority in about 91 percent of the time on my court, and approximately 85 or so percent on criminal cases. So I am hardly out of the main stream.

Senator SIMON. I do not mean to interrupt you, but my staff tells me I have 4 minutes left to get over and vote.

I would simply like to insert in the record at this point the statement of the National Association of Police Organizations, in which using their words, they "wholeheartedly support" your nomination.

[The letter referred to follows:]

NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC.,
Washington, DC, October 22, 1993.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Committee on the Judiciary,
Dirksen Senate Office Building, Washington, DC.

DEAR SENATOR BIDEN: The National Association of Police Organizations ("NAPO") which represents over 143,000 sworn law enforcement officers in more than 2000 associations throughout the United States wholeheartedly supports the nomination of Florida Chief Justice Rosemary Barkett to the Federal Judiciary. The 26,000 NAPO members in Florida are represented by Area Vice Presidents who have unanimously voted for this endorsement.

During the recent retention election in Florida there was much debate and rhetoric. Representatives of the Florida PBA reviewed Justice Barkett's record and the Florida PBA Board of Directors, as well as most mainstream law enforcement associations, voted unanimously to endorse Justice Barkett's retention. She subsequently won a resounding victory indicating the electorate's support for her efforts on behalf of the citizens of Florida.

It is our hope that after careful consideration of her record you will agree that Justice Barkett has the professional experience, personal integrity and judicial temperament to serve as a Federal Judge. We respectfully request that you support and vote for this nomination.

Sincerely,

ROBERT T. SCULLY,
Executive Director.

Senator SIMON. There are other things here that I could enter in the record, but I am pleased to support you. I think your response and your attitude is the right one. I think you will make an excellent appellate court judge, and I hope we have the wisdom to approve your nomination.

Justice BARKETT. Thank you very much, Senator.

Senator SIMON. We will stand in recess for a few minutes.

[Recess.]

The CHAIRMAN. The hearing will come to order.

A minor departure from the ordinary way of proceeding, we have the honor and the privilege of having a former colleague and a very good personal friend, now the Governor of the State of Florida here and he was testifying in another committee down the road, and we invited him to come by.

Welcome, Governor. It is good to see you.

STATEMENT OF HON. LAWTON CHILES, GOVERNOR OF THE STATE OF FLORIDA

Governor CHILES. Thank you, Mr. Chairman.

I am delighted to be here and say that you are looking well. Of course, I remember when you were a boy on the block. [Laughter.]

The CHAIRMAN. I am going to tell a story on you, Lawton. The first day I sat on the Senate floor with you, when I got here, I turned to you—and you may remember—I turned to you and I said, “You know, how long did you spend learning the Senate rules?” I had the book in my drawer there of the Senate rules. You looked at me and said, “Don’t worry about that book.” I said, “Why not?” I said, you know, you have Jim Allen, who was as master parliamentarian, and Robert Byrd. He said, “Look, there is only one rule you have to understand here to do business in the Senate, and it is, “I ask unanimous consent.” If you get it, it’s fine, if you don’t, don’t try.” [Laughter.]

Governor CHILES. Mr. Chairman, I thank you and am delighted to have a chance to be here and to speak a word on the part of Chief Justice BARKETT. She is Chief Justice now of our State supreme court system, and I know she will make a wonderful circuit court of appeals judge. She has had good experience in Florida, had lawyers like Chesterfield Smith and some others that she has had to listen to in arguments.

The CHAIRMAN. Does that speak to her tolerance level?

Governor CHILES. It speaks to many things. But I think she has had an outstanding judicial career in Florida, and we consider her one of our brightest, and I certainly hope this committee and the Senate will confirm her.

The CHAIRMAN. Thank you, Governor.

The truth of the matter is the thing that you and I spent most of our time working on, even though we sat next to each other on the Budget Committee for years, was criminal justice matters, and

you were one of the people in our party who was always pushing for us to have more rational approach to dealing with violence in society, and you have a hell of a record in terms of being tough on crime issues, and your endorsement here today is taken note of, and, at least for my part, I very much appreciate it.

I welcome you and thank you and hope you stick around, if you are able to. I know you have got a thousand things to do.

Governor CHILES. Thank you, Senator.

The CHAIRMAN. I am now going to yield to our colleague from Maine for his opportunity to question the nominee.

Senator COHEN. Thank you very much, Mr. Chairman.

Governor Chiles, it is good to see you again. In fact, I took one page out of the Governor's book. When he first ran for the Senate, he walked across the State of Florida. He was good enough to meet with me and tell me how he did it, and I did the same thing in Maine. We triumphed by going out and meeting the people.

It is good to see you again, Governor.

Justice BARKETT. Is that to say I should have walked to Washington, Senator? [Laughter.]

Senator COHEN. Not at this time of the year.

I was interested in your opening remarks. You said that for all the things you have done right in your life, you owe it to the advice of your family, and that for all the mistakes you have made, you assume personal responsibility. As you said that, I could not help but remember the lines that go something like, "In my life's dying embers, these are my regrets, when I was right, no one will remember, and when I was wrong, no one will forget." You will find that during the course of this confirmation hearing, we will look at when we think you were wrong and omit the hundreds, if not thousands, of times when you were right.

I also would note that many people are under some delusion about the court system. When they look at judges and justices they see black robed oracles who sit in quiet chambers alone dispensing judicial wisdom, unencumbered by personal views, biases, or predictions.

Of course, you know and we all know that is a fiction. Judges are real people, and they are brushed by the wing of experience, as all of us are. They look out at the world through lenses that are clouded, or that are at least covered by a thin film of passion, of preference. It is a measure of judicial temperament to restrain those emotional components that make us human beings.

That rigorous discipline, both in personal behavior and professional thinking, distinguishes those who wish to serve on the bench. There is no way to adhere to this fiction that you and all the others who come before us are looking through an absolutely clear lens which is unencumbered by any past experiences. In Justice Cardozo's little book, "The Nature of the Judicial Process" there is a footnote in which he quotes a French author as saying "In the final analysis, there is no guarantee except the personality of the judge."

So we are looking at the personality of the judge, and I suspect that the people of Florida have already done that. They have looked at your personality very closely and at your philosophy and have not found it particularly wanting. I would like, nonetheless,

to at least explore a couple of issues in the remaining time that I have. I have used up a lot of it just making an observation. But there has been some concern about the death penalty. I am one of the few members of this committee who does not support the death penalty, and yet I found some of the reasoning in your opinion to be curious. I would like to look at the case of *Dougan v. State*.

As I understand it, you joined a two-judge dissent to the court's affirmance of the death penalty in that case. Dougan stabbed and shot a random 17-year-old victim and then sent the victim's mother a tape recording describing the crime. The dissent argued that it was a "social awareness" case because Dougan's fixation on racial injustice, while misguided, served to extenuate the murder. That was one aspect I want to go back to and examine in a moment.

The dissent said—and I am quoting—"the victim was a symbolic representation of the class causing the perceived injustices." The dissent also noted that Dougan, an intelligent, respected well-educated leader in the black community, had redeeming social values. Finally, the dissent concluded, that the death penalty was not merited. I would like to examine the components of the dissent.

There is currently a case, I believe in New York, where we have an individual who stepped aboard, a subway and proceeded to shoot randomly, killing about seven people and wounding more. This apparently, according to reports I have read, was an act of outrage against a society that has discriminated against him because of his color or background. There seems to be a parallel between this case and *Dougan v. State*. I want you to talk about the language used in the dissent where the individual was described as being respected, intelligent, well-educated, and a leader in the black community.

Putting aside Dougan's color for a moment, although that is hard to do in any of these cases, let us turn it around and say that the Defendant was someone like Ted Bundy, who could be described as an intelligent, well-educated, leader in the white community. As I recall, he was planning to run for Congress on the Republican ticket. Fortunately, we were spared that particular congressional race. I suppose you could say that he was an intelligent, well-educated, respected leader in the white community and political circles.

What was the rationale in *Dougan v. State* as to whether there will be similar cases in which the social awareness factor would be a determinant in your mind.

Justice BARKETT. If you will indulge me for just about 2 minutes, I need to explain. The problem in dealing with individual cases is that you are looking at them from the perspective of that one case, instead of from the perspective of what the law requires. And I need to make a couple of observations, if I may, about that.

The death penalty jurisprudence is very difficult. The facts of cases—and, frankly, it is one of the most difficult parts of my job, reading the records of all of these death penalty cases which have in them the descriptions of acts of depravity in many instances which are overwhelming. And the natural response to this in many people's minds is that the death penalty should be applied every time a murder occurs, and certainly in some in which the way the murder is perpetrated is perhaps more heinous than in other ways.

But you are not permitted as a judge to respond emotionally either to hatred for the defendant when he, in fact, has been convicted of their heinous crimes or in sympathy for the defendant because of what he went through. What you are required to do, though, is look beyond the aggravating factors of the crime and not stop there, as many people are wont to do.

The U.S. Supreme Court has required us, in its regulations and rules as it has been reflected in the cases, to look not only at the aggravating factors, but then we must look to the mitigating factors that may make this case not eligible for the death penalty. It has nothing to do with the culpability of the defendant in a moral sense. It has nothing to do with his conviction or the fact that he should be punished and spend his entire life in prison—which is what I voted for in *Dougan*, incidentally. But it has to do with the fact that you must consider both things and weigh them to determine if someone is legally culpable sufficient for the death penalty, not culpable for any other reason.

So that when you look at what we are looking at in mitigating factors, you are looking at things which the Supreme Court has required us to look at, things like the background of the individual and the circumstances of the crime and the motivation of the crime. In looking at that, the dissent, written by Justice McDonald—and I also as an aside have to point out that I have written hundreds and hundreds of cases on the death penalty, Senator, and I have no problem in agreeing with Justice McDonald's dissent. But the words that he used were not mine. They were Justice McDonald's.

But when we are talking about things like the intelligence, someone who is well educated, someone who is a leader in the community, and then the motivation which led him to commit the act—and in the case of *Dougan*, it was a motivation which arose out of an oppression and a racial injustice—you have to weigh it. In and of itself, clearly, feeling racially oppressed is not going to be sufficient as a mitigating factor. I think you have to look at the whole picture and then ultimately decide whether or not it is appropriate.

Senator COHEN. My time has just about expired. Even though the red light is on, I will sneak in one more question.

Here the dissent in *Dougan v. Slate* describes the defendant as "intelligent," "well educated," "a leader," and "respected." If I were to turn that around and say unintelligent, not well educated, not a leader, and not respected, would that have an influence as to whether a person would be subject to the death penalty? In other words, if you are higher up on the scale of intelligence, education, respect, is that a mitigating factor as opposed to someone who is just the opposite?

Justice BARKETT. No. In fact, I have written a case called *Rogers* which delineates how you look at mitigating factors. First of all, you have to decide if the evidence supports whatever mitigating factor is asserted. Second, you have to look at whether a mitigating factor is, indeed, a mitigating factor. An average intelligence is not a mitigating factor. One assumes—and I think I said that in that case. One assumes that that is a given. Everybody has it and, therefore, it cannot be used as a mitigating factor.

The sense that it was used in this opinion by Justice McDonald was in taking a look at his entire record. He was not a habitual offender. He had not a long criminal record. There had been no acts of violence prior to this heinous, horrible act that he committed. And you take a look at all of that in trying to understand the nature of why he committed this act and whether or not his motivation, in conjunction with everything else, mitigated it.

I also have to tell you that the racial climate in which this occurred—it occurred a long time ago. This murder occurred in the late 1960's, early 1970's, in Jacksonville, FL. And you have to take a look at that. This is 20 years later. I am not sure of how that would play out under a given set of circumstances today. And I also have to tell you that this was a very close case. It was discussed very extensively in several conferences. There were times when the position which I took—when I took a position different from the one I took ultimately in the dissent. It is a very close case. I cannot quarrel with a conclusion which would have found it the other way. I cannot quarrel with the majority in that case. I can understand it.

Senator COHEN. Did you file a separate dissent?

Justice BARKETT. No. I joined Justice McDonald's dissent.

Senator COHEN. I am way over my time, and I will have to wait for another time to come back.

Justice BARKETT. Sorry. Thank you.

OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Good morning.

Justice BARKETT. Good morning, sir.

Senator THURMOND. How are you?

Justice BARKETT. Just fine. Thank you.

Senator THURMOND. Chief Justice Barkett, I would like to discuss the case of *Cruse v. State*.

Justice BARKETT. Yes, sir.

Senator THURMOND. As I understand from the trial record, Cruse loaded an assault rifle, a shotgun, a pistol, and 180 rounds of ammunition into his car, and began driving to a shopping center. On the way, he fired the shotgun at a 14-year-old boy who was playing basketball and then at the boy's parents and brother.

At the shopping center, he shot and killed two shoppers who were leaving a grocery store and wounded a third. He then shot at various other customers, killing one and wounding another.

When Cruse heard sirens approaching, he got back in his car and drove across the street to another shopping center. When Officer Ronald Grogan approached in police car, Cruse turned, inserted a new clip into his rifle, and fired eight times into the car, killing Officer Grogan.

Officer Johnson then entered the parking lot and exited his car. Cruse shot at Officer Johnson and wounded him in the leg. Cruse then headed into the parking lot searching for the wounded officer. When he found him, he shot Officer Johnson several more times, killing him.

As a rescue team attempted to move Officer Grogan's car out of Cruse's line of fire, Cruse fired several shots at them and told them to, "Get away from the cop. I want the cop to die."

Cruse then entered a store and began firing at people trying to escape. He killed one more and wounded many others. He then found two women hiding in the women's dressing room and held one of them as a hostage for several hours. In all, Cruse killed 6 people and wounded 10 others.

Cruse was found guilty of, among other things, six counts of first-degree murder. The jury recommended death on all six counts. The trial court imposed the death sentence for the murders of Officers Grogan and Johnson. By a vote of 6 to 1, the Florida Supreme Court affirmed the convictions and the death sentences.

Chief Justice Barkett, in your lone dissent, you voted to reverse the convictions. In addition, you stated that the death sentence was, in any event, inappropriate for Cruse.

Let me begin with the second part of your opinion where you conclude that even if the convictions were to be upheld, the death sentence was in any event not warranted and should be reduced to life. You conclude that the cold, calculated, and premeditated aggravator was not met. In particular, you concluded that Cruse had the pretense of moral or legal justification for killings because the evidence showed that Cruse was acting in response to his delusions that people were trying to harm him. But as the majority pointed out, the consensus of the experts who testified was that Cruse's delusions related to a fear that others were trying to turn him into a homosexual, not a fear of any physical harm.

Chief Justice Barkett, how do you respond to this suggestion that your argument against the death sentence for Cruse, therefore, rests on a serious mischaracterization of the evidence? Do you also take the position that even apart from what you see as a pretense of moral or legal justification there was insufficient evidence of heightened premeditation in the murders of two police officers?

Chief Justice Barkett, with respect to the murder of Officer Grogan, the evidence shows that when Officer Grogan approached in his police car, Cruse turned and inserted a new clip into his rifle and fired eight times into the car, killing Officer Grogan. In addition, as the rescue team attempted to move Officer Grogan's car out of Cruse's line of fire, Cruse fired several shots at them and told them to "get away from the car. I want to kill the cop."

Chief Justice Barkett, with respect to the murder of Officer Johnson, the evidence shows that when Officer Johnson entered the parking lot and exited his car, Cruse shot him and wounded him in the leg. Cruse then headed into the parking lot, searching for the wounded officer. When he found him, he shot Officer Johnson several more times, killing him. Again, what additional facts would be needed to convince you that Cruse had heightened premeditation?

Now, let me ask you a question about your vote to reverse Cruse's convictions. The basis upon which you would have reversed the conviction was the prosecutor's alleged failure to make available to Cruse so-called *Brady* evidence. Under the U.S. Supreme Court's ruling in *Brady v. Maryland*, the prosecution must provide the accused, upon the accused's request, material evidence in its possession that is favorable to the accused.

As you stated in your opinion, evidence is material when there is a reasonable probability that had the evidence been disclosed to

the defense, the results of the proceeding would have been different. You would have ruled that evidence of the names of two mental health experts the prosecution had contacted should have been turned over to Cruse and that the failure to turn over this evidence required reversal of the convictions and remand for a new trial.

In your opinion, you reject the majority's opinion that this evidence was merely cumulative. In addition, you state, "I do not believe the fact that other experts at the trial expressed the same opinion regarding Cruse's mental state is a pertinent part of the inquiry of whether or not a *Brady* violation occurred."

Chief Justice BARKETT, how do you reconcile your position that it is not pertinent under *Brady* for evidence that is merely cumulative with your position that evidence is material for purposes of *Brady* only if there is a reasonable probability that disclosure of the evidence would have led to a different result at trial?

Now, let me now turn to *Hodges v.*—would you care to respond on that before I go to another case?

Justice BARKETT. OK, sir. Senator, first of all, I am trying to do this in the order in which you asked. I certainly can agree with you that there is no moral justification for the actions that Cruse took here, as there is no justification when anybody takes a human life in a criminal way, however it is done.

What I tried to do, Senator—and I want to again reiterate, I do not look for ways to avoid the law. I only look for ways to apply the law, that it has been applied prior to my tenure or prior to the case in which we are dealing.

In this case, the concept of heightened premeditation and the concept of no moral justification felt by the defendant were principles that have been decided by other cases in my court, and what I am trying to do is apply it in a consistent fashion. There was, for example, a case called *Banda*—I do not have the cite, but I will be glad to give it to you—where the unanimous court—I think it was unanimous—said that even in a case where there was premeditation of the kind where someone dug a grave prior to the execution, something of that nature, that because in the mind-set of the person he felt that he was being threatened and that someone was going to come after him, that is something that must be taken into account.

With reference to the heightened premeditation, we struggled—it is interesting when you are trying to make these distinctions between aggravating factors and how to deal with them. Our court struggled very mightily in many, many conferences about how to differentiate between a premeditated murder and the heightened premeditation which the statute requires us to apply in aggravating circumstances. And it is very hard to draw that line.

We knew that the U.S. Supreme Court would not have permitted us to apply the death penalty uniformly for premeditated murder. The U.S. Supreme Court had said that was unconstitutional. We then had to decide, well, then, if we cannot apply it across the board for premeditation per se and we must apply the aggravating factor of heightened premeditation, we had to develop a way of defining this heightened premeditation that has to be taken into account.

There are many cases on this point, and what I was trying to do in *Cruse* is show that in other cases in which the same kind of thing occurred, the result had been different.

With reference to the question of the *Brady* violation, I did not view it, as the majority did, as a cumulative thing but as a very significant matter that all of the State doctors also agreed, along with the defense doctors, or in essence agreed with the significant mental disturbance that this defendant had. And ultimately, as to your last point in reference to a dissent, dissents happen very, very seldom. I think I have dissented approximately 300 times out of 3,500 times. There are times, however, when judges differ, but we have a court that is unanimous, as I have said, approximately 70 percent of the time, and I have been in the majority approximately 90 percent of the time. Therefore, I want to make clear that a select—one case, whether you agree with it or not, cannot be used to fairly examine my record. And I have no hesitancy in applying the law which has been established before I—applying the law of the death penalty both federally and in Florida, Senator.

Senator THURMOND. The 6-to-1 decision, you are the only one that dissented, aren't you?

Justice BARKETT. You sound like my brother, Senator, who is here. And every time that happens, he says, "How come you didn't agree with the other six?"

Yes, sir, I did, but I am pointing out that my dissents are very—rare in the totality of the case law.

Senator THURMOND. Now let me turn to *Hodges v. State*. As you may recall, Billie Ricks was a 20-year-old woman who worked as a convenience store clerk. She complained to the police that Hodges had indecently exposed himself to her. The same day that Hodges was to appear at a hearing on the indecent exposure charge, he shot Billie Ricks to death with a rifle in her store's parking lot.

The jury found Hodges guilty of first-degree murder and recommended that he be sentenced to death. The trial judge found two aggravating circumstances. First, the murder was committed to disrupt or hinder the lawful exercise of a government function by eliminating a witness to a pending criminal charge; and, second, it was committed in a cold, calculated, and premeditated manner.

The trial judge further found that the aggravating circumstances far outweighed any mitigating circumstances. The Florida Supreme Court by a vote of 6 to 1 affirmed Hodges' death sentence.

In a one-paragraph dissent, you first stated that the aggravating factors of witness elimination and cold, calculated, and premeditated are so intertwined here that they should be considered as one. You then found that Hodges' mitigating evidence—that he had no significant criminal history and that he was a good employee and a good and caring husband and father—outweighed the aggravating evidence and made the death penalty inappropriate.

Chief Justice Barkett, I do not understand the significance of your observation that the two aggravators were intertwined. Aggravators arising out of the same murderous episodes are often, if not inevitably, intertwined. That does not at all mean they are redundant. Since witness elimination and the cold, calculated, and premeditated aggravator involved different evils, why shouldn't the

statutory scheme which calls for them to be counted separately be respected?

Justice BARKETT. Senator, I was trying to apply the precedent of my court which prohibits doubling of aggravating factors when they refer to the same aspect of the crime. In a case called *Cherry v. State*, the court specifically said that if two aggravating factors are based on the same aspect of the criminal episode, they have to be considered as a single aggravating circumstance. There is significant jurisprudence in my State that differentiates between aggravating factors.

There are some circumstances where you can have two aggravating factors if they are derived from differing aspects of the crime, but if they—and that has happened. And in many instances, our trial judges will write in their death penalty orders that although it may be this, it may be also this, I considered it as one. So that is a fairly settled aspect of Florida jurisprudence.

Senator THURMOND. Chief Justice Barkett, I would like to discuss the case of *McKinney v. State*. Franz Patella, a resident of the Bahamas, was driving a rental car in Miami when he stopped to ask McKinney for directions. McKinney kidnapped Patella, stole his car, shot him multiple times with a shotgun, robbed him, and dumped him, semiconscious, in an alley. Patella had seven gunshot wounds on the right side of his body and two wounds on his head. He died shortly after being taken to a hospital.

McKinney was convicted of first-degree murder as well as armed robbery, armed kidnapping, grand theft auto, and other offenses, and was sentenced to death. The trial court found three aggravators: the murder was unnecessarily heinous, atrocious, or cruel; it was cold, calculated, and premeditated; and it was committed in the course of a robbery or kidnapping.

In your opinion for the court, you reversed the death sentence on the ground that two of the aggravators had not been sufficiently proven. In your words, "While it is true that the victim was shot multiple times, a murder is not heinous, atrocious, or cruel without additional facts to raise a shooting to the shocking level required by this factor."

Chief Justice Barkett, it seems to me that there clearly were additional facts. Besides the number of shots that made this shooting shocking, it is worth noting that the whole nation has, in fact, been shocked by similar recent incidents occurring in the Miami area. In this case, among other things, the victim was especially vulnerable. He was lost and was seeking help. In addition, he was dumped, semiconscious, in an alley. Why did your opinion ignore these facts in determining that the killing was not shocking?

Justice BARKETT. Senator, first of all, I must note that this is a majority opinion, and the majority of the court concurred in analyzing the case as we did. I also have to note that since this case, we have had reversed on the issue of heinous, atrocious, and cruel, many, many Florida cases which have been reversed by the U.S. Supreme Court.

I have been in the majority several times on this question of whether or not the facts of a case support the heinous, atrocious, and cruel factor. The U.S. Supreme Court told us to take a better look at it, reversed a lot of cases which we have subsequently taken

a look at under *Espinosa*. The only thing I can suggest to you is that we attempt to be as careful as we can in applying Supreme Court precedent to the cases before us, and I believe I have done so.

Senator THURMOND. Chief Justice Barkett, in *White v. State*, White was convicted of robbing a small grocery store and shooting to death a customer. His conviction and death sentence were affirmed on appeal. In a petition for post-conviction relief, White claimed, among other things, that his counsel had been ineffective.

The Florida Supreme Court, by a vote of 5 to 2, affirmed the denial of his petition. In particular, the court addressed in detail and found meritless White's claim of ineffective assistance of counsel.

Your entire dissent, joined by Justice Cogan, reads as follows: "I cannot concur in the majority's conclusion that appellant received a fair trial with effective assistance of counsel."

Chief Justice Barkett, did you not feel an obligation to offer any further explanation why you were overturning a death sentence that had been recommended by the jury, that had been imposed by the trial, that had been affirmed on direct appeal, that had been upheld again by the judge considering the post-conviction petition, and by your supreme court colleagues on appeal?

Justice BARKETT. Senator, one of the most important constitutional duties that I have is to follow the Supreme Court dictates that process be fair, especially, as they have said, when the death penalty is being imposed, the ultimate penalty and a penalty that cannot be corrected at a time after it has been applied.

When counsel is deficient in providing the assistance of counsel that is constitutionally required at a trial to make that determination, I felt it inappropriate then to apply the death penalty if one felt that the counsel had not been adequate and had not been competent in providing counsel to this defendant.

I again have to suggest to you that we write—our court is an extremely busy court. We write approximately 50 cases, opinions, per judge per year, which is a significant number, and I think probably would be among the highest outputs of State supreme courts in the United States. I would very much like to have had the opportunity to write much more clearly or much more expansively in many, many cases, and I would have liked to have had, I am sure, the opportunity to have expanded here. But time constraints sometimes preclude you from amplifying any further than that.

Senator THURMOND. Chief Justice Barkett, in *Engle v. Florida*, Engle and another man—

The CHAIRMAN. Senator, excuse me. Before you go on that case, which is fine and you can have as much time as you want, Senator, can you give me an idea how much longer this line will go? Because we have been going 15 minutes a round, and you are over. It is fine, though. I just want to get a sense.

Senator THURMOND. I have about 10 minutes, 10 or 12 minutes.

The CHAIRMAN. Well, I would ask Senator Grassley, since he is next in order to question, whether he minds if the Senator completes his line of questioning. That is a tough spot to put you in.

Senator GRASSLEY. I would rather have the chairman rule. [Laughter.]

The CHAIRMAN. Mr. Chairman, before you start the next case, why don't we—why don't we give you 10 more minutes?

Senator THURMOND. Chief Justice Barkett, in *Engle v. Florida*, Engle and another man robbed \$67 from a convenience store, took the female cashier, Eleanor Cathy Tolan, from the store, and strangled and stabbed her to death. A four-inch laceration, likely caused by a fist, was found in the interior of the victim's vagina.

The jury recommended life, but the trial judge, finding four aggravators and not mitigators, sentenced Engle to death. By a vote of 6 to 1, the Florida Supreme Court ruled that there was not a reasonable basis for the jury's life recommendation and affirmed the death sentence.

You, in a two-sentence dissent, stated without any further explanation your belief that the record adequately supports the jury's recommendation of life imprisonment.

Again, Chief Justice Barkett, I ask you, do you believe that this conclusory statement satisfies your obligation to provide reasoned decision making? Another 6-to-1 decision.

Justice BARKETT. Yes, sir. Senator, first of all, the basis for my dissent was in a prior case of the Florida Supreme Court, *Tetter v. State*, which is well known in Florida jurisprudence, and it specifically provides, as I pointed out in my dissent, that—and I am quoting from the *Tetter* case upon which I relied—that “in order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.”

We give great deference in our State, and I do particularly, to jury determinations. It is the jury that is the conscience of the community that has heard all of these facts. In this case, a jury had heard all of the facts, had heard all of the mitigating evidence, and it was the people in the sense of the jury who determined that the death penalty was not applicable under the law in this particular case.

I, therefore, was applying the *Tetter* standard to the case in question, and, again, in reference to your dissents, as I have pointed out, dissents are very seldom or very rare. In the overwhelming number of cases, I am in the majority, approximately 90 percent.

Senator THURMOND. Again, six of your colleagues took a different position, didn't they?

Justice BARKETT. Pardon me, sir? I am sorry.

Senator THURMOND. Again, six of your colleagues took a different position?

Justice BARKETT. Yes, sir, but there are 3,000-and-some where we did not differ.

Senator THURMOND. Now I want to ask you about another case. In *Torres-Arboledo v. State*, Torres-Arboledo, an illegal alien from Colombia, rounded up two other men and went to a car body shop where they attempted to take the owner's gold chain. When the owner resisted, Torres-Arboledo shot him to death. The jury recommended a life sentence, but the trial judge, finding no aggravators and not mitigators, overrode it and imposed death.

The Florida Supreme Court again—again, I repeat—by a 6-to-1 vote affirmed the death sentence. Chief Justice Barkett, in a three-sentence dissent, you opine that, “The standard for overriding a

jury life recommendation had not been met in light of the totality of the circumstances presented, it simply cannot be said that no reasonable jury could have recommended life."

Chief Justice BARKETT, if you are going to overturn a death sentence in this procedural posture, do you feel that you have some obligation to identify the circumstances that you think make a life sentence reasonable?

Justice BARKETT. Well, again, Senator, there is an enormous deference under Florida law to what the jury says, and the jury who heard the facts in this case and heard all of the testimony pertaining both to the aggravating factors and to the mitigating factors, the people decided that the death penalty should not be imposed.

My court in *Tetter v. State*, a decision reached prior to my joining the court, has said clearly that it is only in extremely rare cases and only when no reasonable person can differ that the judge, the trial judge, can override what the jury, the people, have suggested ought to be done.

There have been cases where I think that the jury—that no reasonable person can differ, and in those cases, I have voted to approve the override. But they are very, very rare under the *Tetter* standard that we have set forth.

Senator THURMOND. Next I would like to discuss *Hudson v. State*.

The CHAIRMAN. Senator, if I can interrupt for a second so I understand the fact situation, in that case the jury recommended life; correct?

Justice BARKETT. Yes, sir.

The CHAIRMAN. The judge imposed death. You dissented and said, in effect, the jury was right.

Justice BARKETT. That is correct, sir.

The CHAIRMAN. OK. I just wanted to make sure I understood it.

Senator THURMOND. It was a 6-to-1 decision affirming—

The CHAIRMAN. No, I know that. I just—

Senator THURMOND [continuing]. Affirming the case. Six of them went one way, you went the other way.

Justice BARKETT. In these few cases that you are asking me about, yes, sir. In the vast—

Senator THURMOND. Well, I have got a lot more cases, but I only have time to go into about one or two more.

Justice BARKETT. All right, sir.

Senator THURMOND. I would like to discuss *Hudson v. State*. Two months after breaking up with his girl friend, Hudson, armed with a knife, broke into her home during the night. The former girl friend, having received threats from him, was spending the night elsewhere, but her roommate was at home. When she began screaming at him to leave, Hudson stabbed her to death, put her body in the trunk of her car, and dumped her in a drainage ditch in a tomato field.

Hudson was convicted and sentenced to death. By a 6-to-1 vote, the Florida Supreme Court affirmed. In your brief lone dissent, you relied on the trial court's finding that Hudson was apparently surprised by the victim during his burglarizing of a home, and that Hudson therefore was unable to a certain extent to conform his

conduct to the requirements of law. You concluded that the death penalty was disproportionate to the offense.

Chief Justice BARKETT, in addition to the findings that you relied on, the trial court also found that the aggravating circumstances outweighed the mitigating circumstances and that the death penalty was warranted. How is it that you concluded that the death sentence was disproportionate? In my view, anyone who breaks into a home that he believes to be occupied should expect to encounter an occupant. I just do not see how an intruder's surprise should count seriously as mitigating.

Justice BARKETT. Senator, I think that your comments underlie the response that one feels when your house is being invaded and these heinous acts are being committed. The point that I was making earlier was that, by law, we are not permitted by the U.S. Supreme Court to only look at the aggravating factors of a crime, even though emotionally you may want to apply the death penalty in every case in which a murder is committed.

I also have to say I do not think I have ever said that the death penalty was disproportionate to the offense in any of these cases. The proportionality aspect of my decisions has to do with the rules set forth by the U.S. Supreme Court that says that we must apply the death penalty in an evenhanded and equal a way as possible, and that we must engage in a proportionality review to determine how the facts of this case square with the facts of another case.

We have often held on the Florida Supreme Court in cases prior to this one that when a burglar is surprised or does not have the ability to think through the consequences of his or her act, it certainly does not make him unculpable. He is certainly liable for a life sentence, and that is what I voted for in this case. But the culpability aspect of it which goes to the question of whether or not he is eligible for the death penalty under Supreme Court precedent has a different context. And so the proportionality issue had to do with other cases which were very similar to this one and in which the death penalty was not applied.

Senator THURMOND. I will just take one more case. I could go on here much longer, but I will just take one more case.

Justice BARKETT. All right, sir.

Senator THURMOND. Chief Justice BARKETT, in *Burr v. State*, Burr was convicted of first-degree murder and robbery with a firearm and was sentenced to death. His conviction and sentence were affirmed on direct appeal. Following the signing of a death warrant, he filed a motion for post-conviction relief, which was denied by the trial court.

By a 6-to-1 vote, the Florida Supreme Court affirmed the denial of relief. In dissent, you would have decided for Burr based on an issue that you conceded had not even been raised by Burr: the consideration of collateral crimes evidenced during the sentencing phase.

Chief Justice BARKETT, what limits, if any, do you believe exist on your ability to assert claims on behalf of convicted criminals that they have not asserted on their own?

Justice BARKETT. Senator, the first observation that I would make is that the U.S. Supreme Court reversed Burr on the same basis upon which I dissented. We have an obligation also to inde-

pendently look at the record. This is, again, established by prior case law, and in taking—we have a separate obligation to assure ourselves that the death penalty has been appropriately applied, and we have a separate obligation to take a look at the whole record.

It is only because we have that separate obligation which the Supreme Court has considered in determining that our death penalty is constitutional, this careful scrutiny that we give to the death penalty. In this case, the death penalty had been imposed because of a prior conviction that this defendant had. It was determined, however, that this prior convict had been vacated and, therefore, should not be considered.

The U.S. Supreme Court, when it took *Burr*, reversed the case and said look at it in light of *Johnson*, which is a case which precisely said that you cannot impose the death penalty based upon a conviction which had been set aside. And my court, when it was returned from the U.S. Supreme Court, then vacated the sentence pretty much unanimously.

Senator THURMOND. My question is about the propriety of making an argument that the defendant himself did not make. The fact that the court ultimately vacated the sentence shows that the process worked without the sort of extraordinary judicial intervention that you resorted to.

Given the strong public interest in making sure that brutal murderers do not get back on the street, would you also make the argument on behalf of the State under like circumstances?

Justice BARKETT. No, I think I understand. You are concerned that I would just out of the blue pull something out of the air to make a ruling upon, and that—because this language suggests that we have an independent obligation. My response to that, Senator, in different kind of cases perhaps not, certainly not. In this kind of case, however, there is prior case law which requires me as a supreme court justice, as a court of last resort, not to apply the death penalty unless we have done an independent review. And I think you are going to find many of our cases where we have stated in the majority. We have looked at all of the record, and even though there are lots of issues that were not raised, we have looked at them and we have satisfied ourselves that the death penalty has been appropriate.

If we do not do this, the death penalty, in my judgment—if we do not provide this kind of scrutiny, the death penalty would be deemed unconstitutional by the U.S. Supreme Court.

Senator THURMOND. Well, I am not going to go any further. I believe my time is up. I just want to say that case after case after case after case, 6 to 1, six other judges going one way, you going the other way that takes up for the defendant. That is a strange record.

Thank you.

The CHAIRMAN. Thank you, Senator.

I am going to switch back to the Democrats for a second so that an unrelenting charge has at least another perspective put into it, and I am only going to take 5 minutes of the time.

Senator GRASSLEY. How much time are you going to take?

The CHAIRMAN. Five minutes.

Let me put in focus about unrelenting—I mean this case after case after case after case. In the one case the Senator from South Carolina cited, the one involving the fellow who was involved in the indecent exposure and then came back and blew the person away, if I am not mistaken, the Supreme Court remanded that back to you all, didn't it?

Justice BARKETT. Yes, it did.

The CHAIRMAN. How did you rule when they remanded it back?

Justice BARKETT. We vacated the death sentence, Senator.

The CHAIRMAN. You vacated the death sentence.

I am going to come back to a number of cases, that case where the testimony indicated that—this is the case of *Robinson v. the State of Florida*, where the testimony indicated that Robinson pulled up behind St. George's parked car—I am reading—and ordered her into his car at gunpoint, handcuffed her, drove to the cemetery where he sexually assaulted her on the hood of his car, then he ordered Fields, the co-defendant, to do the same, and Fields complied. Afterwards, Robinson expressed concern that she could identify them. He then walked up to her, put a gun to her cheek. Fields heard a shot, saw St. George fall, and watched Robinson stand over her and fire a second shot at her.

How did you rule on that case?

Justice BARKETT. I think I voted to affirm the death penalty, Senator.

The CHAIRMAN. You did.

Another heinous case: in the late morning or early afternoon before authorities found the body of Angela Baird in the tall grass in a field behind her home. Her body was lying on its right side, gagged, hog-tied by the wrists and ankles; the body was nude from the waist down. Lying nearby were her school books, jacket, purse, and empty paper lunch bag. The autopsy revealed that the victim's left—and I will not read the rest of it.

How did you rule in that case?

Justice BARKETT. The mitigating factors did not outweigh the aggravating factors in that case, and I voted to affirm the death penalty.

The CHAIRMAN. I can list tens of these cases like that.

Justice BARKETT. Two hundred and sixty-some.

The CHAIRMAN. And not all as grisly as these, but focusing on the grisly facts of an isolated case in which a nominee considered the application of the death penalty I think makes it impossible to fairly and accurately consider your judicial philosophy. An experienced and conscientious judge, no matter how liberal or conservative, must sometimes vote to reverse a conviction or sentence in a case involving heinous and atrocious crimes.

Consider the case of Justice Scalia, never thought to be a wacko liberal by anybody that I know of, and let me read one of his cases in isolation. In the 1987 U.S. Supreme Court case of *Hitchcock v. Dugger*, originally a Florida case, Justice Scalia wrote a unanimous U.S. Supreme Court opinion reversing the death sentence of a man convicted of strangling his 13-year-old step-niece. The defendant confessed that he had killed his step-niece because she had threatened to tell her parents about him having had sexual intercourse

with him. In other words, the defendant killed the girl to cover up the statutory rape of his step-niece.

The jury found the defendant guilty and recommended the death sentence, and the trial judge agreed. Eleven years after the crime, however, the Supreme Court overturned the sentence because the trial court had considered only listed statutory mitigating factors. Justice Scalia wrote for the Court, holding that the Florida trial court had erred in failing to consider that the murderer's father had died of cancer, that the murderer had sniffed gasoline fumes as a child, causing his mind to wander, that he was one of seven children in a poor family, and that he was a fond and affectionate uncle.

Despite the decision by both the trial court, the judge and jury, that the killer deserved to be sentenced to death, Justice Scalia, writing for a unanimous court, reversed because he had sniffed fumes as a kid, his mind wandered, he was one of seven poor children, et cetera. And he reversed.

The test being applied to you, judge, could be applied to any judge. Justice Scalia's opinion in the *Hitchcock* case illustrates how this kind of exercise does not permit, in my view, an accurate portrayal of a nominee's record. Rather than considering the gruesome facts of every death penalty case in which the nominee is voted to overturn, I think your record should be viewed in context.

Your record on the death penalty is clear. You voted to affirm the death penalty in over 200 cases—270, I think you said—including cases in which a majority of the U.S. Supreme Court had agreed that the death sentence should be overturned, *Espinosa v. Florida* and *Schlur v. Florida* in 1982.

So I cite that not in any way to criticize Justice Scalia. He is a fine Justice. He is considered one of the most brilliant Justices to serve on the Court. He is considered to be the epitome of the conservative point of view on the Court. But he was bound by the law. And when I get a chance to question again, I am going to ask you, because I do not think, quite frankly, Judge, you have had an opportunity to clearly explain the Florida law as it relates to mitigation and aggravation and what you must consider.

I now yield to my friend from Iowa.

OPENING STATEMENT OF SENATOR GRASSLEY

Senator GRASSLEY. Well, do not speak for me when you say Scalia satisfied all conservatives.

The CHAIRMAN. No, no, no, no. I did not say he—

Senator GRASSLEY. Because on the point of congressional intent, he will not look beyond the statute, and I think that it is wrong for anybody sitting on the Supreme Court not to try to determine some congressional intent—

The CHAIRMAN. Senator, for the record, let me state, if I said it I did not mean it. What I meant to say was—I thought I said that Justice Scalia represents and is thought to represent the conservative view in the Court, not that all conservatives agree with Justice Scalia.

Senator GRASSLEY. Well, then, he does not represent my conservative view on the Supreme Court when he does not take congressional intent into account.

The CHAIRMAN. I happen to agree with you on the merits of that position. That makes us both moderates.

Senator GRASSLEY. Well, I am glad you are moving to the center. I am not. [Laughter.] I want to talk about what you and I visited about a little bit in my office the other day. One of those things was obscenity and child pornography. I would specifically like to talk to you about your opinion in the *Stall* case. For the audience, this was a constitutional challenge to the conviction of several pornographers under Florida's RICO statute for predicate violations of the State obscenity laws.

The majority of your court upheld the constitutionality of the obscenity law. You dissented, and you wrote about the role of judges when there is a collision, in your words, "a collision between legal principles and personal views of morality." I think that is a perfect description of the issue that we are presented with in this hearing, your ability to apply the law and leave moral and political questions to the political branches.

In our meeting Tuesday, you expressed your resolution never to let your own views affect your application of the law. On its face, I cannot find any fault with that statement. But your dissent in *Stall* worries me because, as I understand it, it shows a tendency towards judicial activism. Your decision seems infected with moral relativism. You say the definition of obscenity is relative, so the State cannot outlaw it.

I personally believe, and the Supreme Court has held, a community can outlaw foul and degrading obscenity consistent with the U.S. Constitution. In other words, obscenity is not protected speech. In *Stall*, you said there is "a basic legal problem with the criminalization of obscenity, that it cannot be defined." You argued that because two people might disagree on what is obscene to them, we cannot outlaw material the community considers obscene.

Do you believe, as you suggested in *Stall*, that it is unconstitutional for States to enact any laws prohibiting obscenity?

Justice BARKETT. First of all, Senator, I think it is clear that States can pass laws prohibiting obscenity. If I may, I would like to go back to the question of personal views, though. If I had my druthers and I were applying personal views, there would be much in the speech that I have heard in the last 6 months or so that I would outlaw and regulate. I think that one does not apply one's personal views. There would be much in the pornographic area that I do not think would be, any question, in terms of personal views, would be offensive in terms of what that has done to the victimization of children and the victimization of women. So—

Senator GRASSLEY. When you talk about your own views, and you are talking about the last 6 months, are you talking about the direction the Canadian Supreme Court is taking in that area?

Justice BARKETT. No, I am not familiar with that, Senator. I am just saying that there is much in free expression that one does not agree with, and were one to apply one's personal views, one would not be—one would not necessarily be consistent with the first amendment and the requirements of the first amendment.

But, that aside, let me direct my attention to *Stall*, which is what you have asked about. *Stall*—

Senator GRASSLEY. Basically I want to know if we can outlaw obscenity based on community standards.

Justice BARKETT. Yes. The Federal—

Senator GRASSLEY. Flat out yes?

Justice BARKETT. Flat out yes. The Federal courts have said so in the Federal system, and the Florida courts have said so in the Florida system in cases in which I have concurred. *Stall* dealt with a specific statute defining sexual conduct. It had language in it which, in my judgment, was very ambiguous and which fell afoul of the Florida constitutional provision to make it clear to people what acts they were engaging in that would be criminal and would be criminally prosecuted.

In a later case called *Schmitt*, the Florida Supreme Court had before it the very same statute, and in that case the Florida Supreme Court agreed with me that the offending language was unclear. And when they agreed that that part should be taken out of the statute, I then concurred with the majority of the court in upholding the statute as constitutional under Florida's law.

Senator GRASSLEY. Well, in the *Stall* case, the majority opinion was guided by the U.S. Supreme Court's obscenity cases. And your dissenting opinion, was quite explicit. You said that the criminalization of obscenity "runs counter to every principle of notice and due process in our society," which would seem to include the U.S. Constitution.

I would like to have you clarify that specific statement.

Justice BARKETT. Senator, I am sorry. I think maybe you were not in the room when I was explaining how one views these things. And when one is looking as a Florida judge in cases which impact some values which the Florida Constitution has expressly valued—for example, the right of privacy in our Constitution, which is an added concept to the concepts of due process and first amendment issues. When one is looking at cases from that perspective, one looks at them differently than one looks at Federal cases which are governed only by Federal laws.

There is no question that you cannot take one part of my view in *Stall* and not look at the same judgment or the same view in *Schmidt*. And in both those cases, the same statute was being decided, the same statute was being considered. In one case, it had this language that defined or attempted to describe conduct which—well, those of us that watch—I didn't, but those of us that had the opportunity to watch the Super Bowl could have deemed some of the conduct there violative of this statute.

When one takes a look at language which could have criminalized very innocent behavior and then take a look at the very same statute later in *Schmidt*, where that language was deleted or omitted or found to be unconstitutional by the court, and with which I concurred, I do not think you can fairly say that I have held that no State regulation of pornography is possible.

Senator GRASSLEY. There is an entirely different standard on child porn than there is on obscenity, and you are comparing a child porn? with an obscenity—

Justice BARKETT. The definition of the conduct is the same, Senator, in my judgment.

Senator GRASSLEY. Does your statement, then, that criminal obscenity laws, "run counter to every principle of notice and due process in our society," apply only to Florida law?

Justice BARKETT. It had to do with an attempted definition of criminal conduct in the statute in question which really was not clear, Senator. And later on, when the court took a second look at it, they decided that that language was, indeed, ambiguous, and over-broad and could not be appropriately defined and eliminated it from the statute. And at that point, I concurred with the constitutionality of that statute.

Senator GRASSLEY. Well, I fail to see how the possibility that some people might disagree about what is obscene undermines our ability to declare that something violates contemporary community standards under the test developed by the Supreme Court. There are organized groups who argue that child pornography should not be permitted, and that does not mean that a State cannot prohibit child pornography.

In the criminal law generally, many laws have a subjective aspect. Reasonable people can probably disagree about what constitutes criminal negligence or child neglect, but that does not mean that those laws are unconstitutional. So how does subjectivity make the statute in the *Stall* case unconstitutional?

Justice BARKETT. I think, Senator, again, when you view these cases, you are looking within the context of Florida constitutional values and expressions of policy and the Florida Legislature as well as the prior cases under the Florida law.

When a legislature attempts to pass a law, one has to understand what law is—what actions are being criminalized. You must be able to understand the general nature of the act that you are prohibited or going to be prohibited from engaging in. Therefore, under our State laws and constitution, one has to very clearly delineate what those are.

In this statute, in the area of pornography, the statute applied the *Miller* test, which is analogous to the Federal test, but in this statute they went further, and they attempted to define something as obscene which was ambiguous and which could be susceptible to differing interpretations.

When we looked at it from that perspective, it was my judgment that under Florida's law that language was ambiguous, under some due-process considerations, taking into account the Florida right of privacy perspective, and therefore, it failed to pass constitutional muster.

When later on we agreed that that language was ambiguous and took it out of the statute, I upheld the statute. Ultimately the only thing I can suggest to you is that there is no question that Federal law has prohibited pornography and has permitted States to regulate pornography and to prohibit it. And whatever the Federal law is is what I would then be governed by on the Eleventh Circuit Court of Appeals. And it is that law with which I would comply without any hesitation or question.

Senator GRASSLEY. Again, I will state, the majority in *Stall* based their decision on decisions of the U.S. Supreme Court and the Federal Constitution. You rejected that analysis in your dissent, which was very short: You also joined in that same case with

Judge Kogan, and enthusiastically endorsed that dissent. That opinion argued that we cannot prohibit obscenity, even its production and distribution, because we might interfere with the fundamental right to consume obscenity.

Justice BARKETT. I think that Justice Kogan's dissent is replete with citations to Florida cases and Florida law, Senator. All I am suggesting is that you look at these cases very differently when you are on the State supreme court of last resort and when you are required to follow Federal precedent. And I do not think there is anything in my judicial career which would indicate, from the time I was a trial judge, an intermediate appellate court judge, as well as on this court, that would indicate that I would fail to follow precedent as I saw it.

Senator GRASSLEY. Well, let me read you a paragraph that comes from the U.S. Supreme Court's decision in *Paris Adult Theater*, that the majority used in *Stall*. "A man may be entitled to read an obscene book in his room or expose himself indecently there. But if he demands a right to obtain the book and pictures he wants in the market and to gather in public places, discreet, but accessible to all, with others who share his taste, then to grant him his right is to affect the world about the rest of us and to impinge on other privacies: Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which in truth we cannot), what is commonly read and seen and heard and done intrudes upon us all, wanted or not."

You say that you look to the U.S. Supreme Court for persuasiveness and guidance, even when applying Florida law, I think the quote illustrates well how obscenity harms us all. By joining Kogan you were endorsing his view that their quote from the *Paris* case was wrong.

Would you agree that the Federal Constitution does not guarantee a right to produce and distribute obscene pornography in contrast to the right you and Justice Kogan found in the Florida Constitution?

Justice BARKETT. I would agree that the *Miller* test as established by the U.S. Supreme Court is the test that must be applied in a Federal context and that I would apply it with no hesitation if I have the opportunity to serve in the Federal system, absolutely.

Senator GRASSLEY. Well, how do you explain your rejection of the analysis in the *Paris Adult Theater* that I just quoted to you?

Justice BARKETT. As I said, Senator, what happens is you look at things in the perspective in which you are, and the perspective in which we sit as a court of last resort, which has a constitution, which values privacy so much that it expressly states it and that has a different analysis of such things as substantive due process and procedure and equal protection, you look at it from a different perspective.

What I can tell you is that when I am on the—oh, oh, I am so sorry. If I have the opportunity to serve on the Eleventh Circuit Court of Appeals, when you are looking at it from the perspective of a Federal judge, you are looking at it only from the perspective of Federal law. And it is a different perspective.

The CHAIRMAN. May I ask a question, Senator? Because I want to make sure I understand. If article I, section 23 of the Florida

Constitution which provides—and I will quote it—“Every natural person has the right to be let alone and free from governmental intrusion in his private life except as otherwise provided herein.” Were there not such a provision in the Florida Constitution, would you have ruled differently in the case in question?

Justice BARKETT. If we were governed by Federal law, I would have applied Federal law, without any question.

The CHAIRMAN. Would you be governed by Federal law without the Florida Constitution provision?

Justice BARKETT. Assuming there were no other constitutional provision in Florida impacted, of course, or Florida law.

The CHAIRMAN. Thank you. I am sorry for the interruption.

Senator GRASSLEY. Well, if the right to consume obscene pornography also protects the production and distribution of obscenity, does that mean that I or, even worse, my grandchildren, cannot be protected from constant bombardment in the convenience stores, on the newsstands, on the theater fronts, or any other public place where, obscene acts are being graphically depicted?

Justice BARKETT. Senator, I have no question that Congress can regulate or prohibit pornography or obscenity, and I would apply the law that pertains to that question should I have the opportunity to do so.

Senator GRASSLEY. But you are saying that obscenity is impossible to define, and if we cannot define it consistent with due process, how can we, in your judgment, place any restrictions on it?

Justice BARKETT. Well, the Florida Supreme Court has done it. In defining what is pornographic, what they did in *Stall* is they added some language which said, to be specific, the touching of clothed buttocks is pornographic. And as we all can imagine, there are lots of situations in which one touches the clothed buttocks of someone that is absolutely innocent. If this statute—

The CHAIRMAN. Is that what you meant by a lot of people in the Super Bowl would be—

Justice BARKETT. Yes, sir.

The CHAIRMAN. Hell of a lot of guys I played ball with in school would be in trouble.

Justice BARKETT. And I think that when one attempts to—there is no question that there is a good-faith effort that a legislature is attempting to define that which is prohibited so that people know. People have a right to know what conduct is going to be criminalized, and there certainly is—you can describe it. You can describe pornography, as the U.S. Supreme Court has said, to the extent—and it can be regulated. It can be prohibited. But, on occasion, legislatures go further and invade and impinge upon some constitutional principles in terms of passing laws that are ambiguous or that are unclear or that impinge upon some other constitutional aspects.

I, again, have to ask for indulgence in terms of repeating myself. I do not think it is fair to take a look at someone's record by isolating one language or one piece of work rather than taking a look at someone's entire judicial career. I have been a judge since 1979. I have had the opportunity to serve at every level of court, and I think that when you look at a record that is reflective of the majority or the mainstream of courts such as the Florida Supreme Court,

I, with all due respect, do not think you can make a case for suggesting that I am outside of the mainstream.

In terms of the ultimate concern that you raise, Senator, there is no question that obscenity can be regulated, that the U.S. Supreme Court has set forth the parameters of that regulation, and that every Federal judge who is going to be true to their oath—and I have never, to my knowledge, violated mine—would follow that Supreme Court precedent.

Senator GRASSLEY. You are talking about the *Miller* case?

Justice BARKETT. Yes, sir.

Senator GRASSLEY. Well, I guess that would have been my last question. If approved by the Senate, and if you sit on the court, then you will follow the precedents of that court and uphold State prohibitions on obscenity that satisfy the *Miller* test?

Justice BARKETT. Yes, sir, of course.

Senator GRASSLEY. This may be going over ground, but I want to read to you a couple sentences that you should explain, because I do not think these comport with what you just said. You wrote, "A basic legal problem with the criminalization of obscenity is that it cannot be defined. Such a procedure runs counter to every principle of notice and due process in our society." It seems to me that with that basic philosophy, it is going to be hard for you to follow *Miller*. You seem to insert your own views, opposed to applying the community standards analysis. Basic to *Miller* is the fact that we uphold laws prohibiting material violating those community standards as long as the material has no literary, artistic, political, or scientific value, or no appeal exclusively to prurient interests.

Justice BARKETT. I am sorry. I did not—if you are suggesting—

Senator GRASSLEY. The question—

Justice BARKETT. I will not have any problem following Federal law when I am required and if I am required to follow Federal law. But I also have an obligation as a judge in the State court system to follow the State Constitution and the State precedent and the State law. And sometimes they may differ, Senator.

Senator GRASSLEY. And you showed that when you agreed with Kogan, and went along with him on his dissent when he was finding fault with the majority, who in turn were or were agreeing with the U.S. Supreme Court on some of these issues?

Justice BARKETT. Yes, sir, but in the context of Florida case law and Florida constitutional precedent.

Senator GRASSLEY. Mr. Chairman, I am done with obscenity.

The CHAIRMAN. Thank you very much.

We are going to take a break now for a minute, but let me take just a minute here on this, and then we will break for lunch and come back at 1:30. Let's make sure we understand what the tests are in the *Miller* case. We keep referring to them. One is whether the material appeals to the prurient interest in sex. Two is whether the material portrays sexual conduct in a patently offensive way. And, three, whether the work taken as a whole lacks serious literary, artistic, political, or scientific value. All three of those things.

Justice BARKETT. Yes, sir.

The CHAIRMAN. And reasonable people can have and do and will continue to disagree on what they are. But let me make a point

that I think seems to be continually missed here. It is either being missed by me alone or everyone else.

My understanding is that, as a matter of basic constitutional law and the separation of powers doctrine and the notion of Federalism, taking all three of those concepts, that if the State of Delaware or the State of Florida wishes to be more expansive in its granting of a recognition of rights than the Federal Constitution is, it is permitted to do so. The times when the Federal Constitution does not permit a State to do such a thing is when the States conclude that they are going to be more cabined in their view of what it is a person, an individual, is entitled to do or not to do.

Case in point: If the Florida State Legislature wanted to say that nude dancing was—or it was written in the Florida Constitution that nudity on public beaches is constitutionally protected by the State of Florida, and the Supreme Court had ruled that nudity in public places violates—that the statute written by the U.S. Congress saying nudity in a public place is illegal, and if the Supreme Court had ruled that nudity in public places under that statute is, in fact, obscenity, you could still have nudity on public beaches in Florida without violating the Federal Constitution. Is that not correct?

Justice BARKETT. Yes, sir.

The CHAIRMAN. So one of the issues here is, as I understand it, you believe that, among other things, the section of the Florida Constitution, I might add, adopted in 1980 by the people—this is not adopted, you know, in 1880—by the people of the State of Florida, they believed more along the lines of a former Justice who used the phrase which is oft quoted, “the right to be let alone.” He had defined in the penumbra of the Bill of Rights that right to be let alone. They figured the heck with penumbras, we are going to write it into our Constitution. And it says, “Every natural person has a right to be let alone and free from Government intrusion to his private life except as otherwise provided herein. This section shall not be construed to limit the public’s right to access to public records and meetings as provided by law.” End of section.

So the Florida folks said, We are not so sure we are going to let it up to the Supreme Court of the United States to decide whether we have rights that we think we have that are not enumerated in the Constitution, in the Federal Constitution, so we are going to make it real clear.

So by any reading of the Federal Constitution and the State constitution, Florida’s Constitution is more expansive. How much more? No one knows. But it is clearly more expansive. And it is that part of your rationale?

Justice BARKETT. That is precisely correct, Senator. Under my obligation as a Supreme Court Justice, it includes applying the Florida Constitution to Florida citizens.

The CHAIRMAN. You have no idea how unusual this is to me. Never did I think when I was in Holy Rosary grade school I would be required to defend a nun against the charge she was soft on pornography. [Laughter.]

The CHAIRMAN. This is really an interesting turn of events for me. A former nun, I might add.

Let me say we will now recess until—we were going to reconvene—I told Senator Hatch that we would reconvene at 1:30 because of his schedule, but since we have gone a little longer than we thought, we will reconvene with the permission of Senator Hatch at 1:45.

I expect, Justice Barkett, that we will finish this afternoon and that Senator Hatch has a number of questions, as do others. I think the questions you have been asked have been fair questions so far. I think they warrant you having to explain them. And I am sure there are going to be others.

You are doing a fine job. Let's just keep this moving, and hopefully we can finish this at a reasonable hour early this afternoon.

Justice BARKETT. Thank you very much, Senator.

The CHAIRMAN. Thank you.

Justice BARKETT. I appreciate it.

The CHAIRMAN. We are in recess until 1:45.

[Whereupon, at 1:05 p.m., the committee recessed, to reconvene at 1:45 p.m., this same day.]

AFTERNOON SESSION

Senator HATCH. Justice Barkett, why don't we begin? Senator Biden just said let's just go ahead because we do have a lot of things to ask. And let me just state this preliminarily. If you need any time or you need to break or you need any kind of a break, just let me know.

Justice BARKETT. I will. Thank you very much, Senator.

Senator HATCH. Because I am surely going to honor your feelings.

I think there are real important questions. Let me just say that I believe that the rulings on issues of State law are very probative of how a judge will rule on the Federal bench. And as we have already established, appellate judges have a great deal of discretion in determining whether and how existing precedent applies. And as I mentioned before, they also face a lot of cases of first impression, and it seems to me that where a State judge, in deciding an issue of State law, has expressed disagreement with or even hostility to a U.S. Supreme Court precedent, one can expect that that very same judge may be very stingy or rather stingy in applying that precedent. So I very much share the concerns, for example, that Senator Grassley raised over your views on obscenity. They worry him. They worry me. On the other hand, I am very interested in your answers as well.

I had been mentioning before Senator Simon needed to take the microphone that with regard to the *LeCroy* decision—I had gone into that—where the Supreme Court subsequently rejected the position you took. For present purposes, however, I would simply like to apply the methodology of your *Zrillic* opinion to the position that you took in *LeCroy*.

Applying that *Zrillic* methodology, one would say that a bright-line age minimum of 18 is both under-inclusive and over-inclusive. It is under-inclusive because it fails to protect from capital punishment those persons over 18 who, in the language of your *LeCroy* dissent, "have not fully developed the ability to judge or consider the consequence of their behavior." It is over-inclusive because it

does protect those under 18 who have, in fact, fully developed their deliberative faculties.

Moreover, your *Zrillic* methodology would appear to dictate the conclusion that the 18-year bright line is simply irrational since it would exempt from the death penalty a heinous murderer who was 17 years, 11 months, 28 days, at the time of his or her offense, but would not exempt someone who was a few days older. So it seems to me that your *Zrillic* methodology leads to the conclusion that what you thought in *LeCroy* to be constitutionally mandated under the eighth amendment is instead constitutional impermissible under the equal protection clause.

So I would invite any comment you care to make on that, but those are some of the things that bother me.

Justice BARKETT. Right, Senator. First of all, the *Zrillic* methodology implies that I somehow used equal protection as the focus on *Zrillic*, and I can only tell you that that is really not at all the focus which concerned me in *Zrillic*. I was dealing primarily with the property issue.

I have never thought about the equal protection analysis in terms of the death penalty, very candidly, and I am not sure how it would—I mean, I do not think there is any question that it has application here, so I do not make the connection.

The only thing I would add to that would be, as I said to Senator Simon, when I decided *LeCroy*, the U.S. Supreme Court had decided only *Thompson*, which drew the bright line at 16 years old. Under 16 years old, you could not execute a minor, and they left open the question of the 18-year-old situation. I determined that it would be a violation based upon the analysis that I utilized. I do not think there is any question that I would apply whatever law the U.S. Supreme Court said was applicable, should I have the opportunity to serve on the eleventh circuit.

Senator HATCH. Well, one of the things that I have been pointing out is I am concerned that you will invoke over-broad principles that could be easily manipulated, and naturally I think you would see why I would be worried about that, because you do cite the equal protection clause of the Constitution in the decision.

Let me move on. My concerns over how your opinions have applied rational basis review under the equal protection clause are also triggered by how your opinions have applied rational basis review under the Federal due process clause. I would cite the case of *State v. Saiez*, which was in 1986. In that case, you wrote an opinion for the Florida Supreme Court holding that a State law criminalizing the possession of embossing machines capable of counterfeiting credit cards, to use your language, "violates substantive due process under the Fourteenth Amendment to the United States Constitution."

Now, specifically, you stated that the law was "not reasonably related to achieving the legitimate legislative purpose" of curtailing credit card fraud. And in your words, you said, "It is unreasonable to criminalize the mere possession of embossing machines when such a prohibition clearly interferes with the legitimate personal and property rights of a number of individuals who use embossing machines in their businesses and for other non-criminal activities."

Now, I would like to focus not so much on the result reached in *Saiez* as on the principle set forth, and let me just ask this question: Are you aware of any Federal authority for the proposition that criminalizing ownership of an item violates substantive due process if that item has legitimate noncriminal uses? You cited no such case in your opinion, but are you aware of anything?

Justice BARKETT. No, Senator. The opinions upon which I relied, again, were Florida cases, and I can only cite you to a case called *Leoni*, which makes it—that was a case where the State attempted to regulate operations of a drugstore which did not deal with the preparation of controlled drugs and medical suppliers. And the language that is used in that case—and, again, I have to point out that due process concerns in Florida are different than Federal due process concerns. The language in this case, which was written by one of our Justices, Justice O'Connell, way before I ever was on the bench at all, I think, which talks in terms about to exercise this power, that is, the police power, to the detriment of the individual or class, it must first be clear that the purpose to be served is not merely desirable but one which will so benefit the public as to justify interference with or destruction of private rights. And since that time, we also codified the Florida Constitution.

So I am not aware of the same analysis being applicable under Federal cases, and I can only reiterate to you my view that when you are in the Federal courts, you are looking only at Federal analyses and Federal cases, and I would apply that.

Senator HATCH. You say you applied Federal due process law in this particular case?

Justice BARKETT. Well, did I say that? My only point—and, again, I think I have quoted—

Senator HATCH. Let me point it out to you on page 1127. It is the second paragraph in the right column. I have to get my glasses on. I am having a rough time seeing this. "Although *Saiez's* over breadth and vagueness challenges fail, section 817.63 is nevertheless unconstitutional. It violates substantive due process under the fourteenth amendment to the United States Constitution and article I, section 9, of the Florida Constitution."

Justice BARKETT. I recognize that, Senator. But if you go on to look at the language that is used from other cases, they are all Florida cases which have utilized the same phrase, but interpreted it in a different way.

Senator HATCH. The next paragraph down, in the middle of it, it says, "the due process clauses of our Federal and State constitutions."

Justice BARKETT. I know.

Senator HATCH. So, as you can see, I could not help but read that and wonder why you would do that, because a broad range of criminally proscribed items also have legitimate uses. For instance, marijuana can be prescribed as a medicine. Switchblades can be used to slice apples. Certain drug paraphernalia can be used for tobacco purposes. Explosive devices can be used to build tunnels.

I guess the question is: What U.S. Supreme Court authority is there for concluding that society, through its elected officials, lacks the power to determine that the harmful effects of some or all of

these so outweigh the beneficial effects that possession should be criminalized?

Justice BARKETT. I understand that in the Federal context you would not be making that analysis, Senator, but in the Florida context you would.

Senator HATCH. You could do that.

Justice BARKETT. You would be required to, and we did, and I think that opinion was unanimous, or at least nearly so, if I am not mistaken.

Senator HATCH. Well, I wonder even under the Florida context, because I see no reason why the principle stated in your *Saiez* opinion would not apply with full force to all of those examples that I just went through. I could add, in my view, that the issue is not the substantive wisdom of any given State law. I may agree or disagree with that, just as you may. The issue is what branch of government should have the power to make those decisions. And legislators may make from time to time what some, including you and I, consider unwise decisions. But unless those choices contradict the Constitution, their constituents, not judges, ought to make the final determination as to whether or not they continue. And they ought to be the check on such laws if they are wrong.

The substantive due process theory is just another tool for judges to override the legislative process if they want to and override legislative choices. So I am concerned that an over-broad use of that principle can be applied selectively, reflecting the preferences of judges reviewing the law acting as a kind of super-legislature. And that worries a lot of people up here, including me.

Justice BARKETT. Well, I think, Senator, in terms of the general principle of courts acting as legislators and providing any lack that they might find in the statute, I have made myself fairly clear over my career, suggesting that I do not think that that is appropriate.

In terms of *Saiez*, I can only suggest that you look at the cases upon which I relied, which express the same principle that I understand you are having difficulty with, because it is different than the Federal standards. But in *Delmonico v. State*, the court declared a statute that prohibited the possession of spear-fishing equipment in an area of Monroe County to be unconstitutional and explained that it included that same principle. In *Robinson v. State*, a statute that prohibited the wearing of any mask or covering whereby any portion of the face is hidden, concealed, and so forth, to be unreasonable.

Although the terms, the phrases that are used, may be the same in both bodies of law, the meanings that is ascribed to them are very different.

Senator HATCH. Well, the question that naturally arises is: Why, then, didn't you apply just the State due process law and not apply the Federal due process?

Justice BARKETT. I think in essence I did, Senator, and all I can—I mean, I can certainly accept that in a body of law there are going to be occasions when you are going to be careless, but I think—

Senator HATCH. Oversight.

Justice BARKETT [continuing]. That there is no question that when you look at the cases upon which this one relied and upon

the language which is quoted from other Florida cases, it was clearly from that perspective that I was acting.

Senator HATCH. All right. In *Florida Society of Ophthalmology v. Florida Optometric Association*, you stated, "Constitutions are 'living documents,' not easily amended, which demand greater flexibility in interpretation than that required by legislatively enacted statutes. Consequently, courts are far less circumscribed in construing language in the area of constitutional interpretation than in the realm of statutory construction."

Now, do you believe that courts should be "far less circumscribed in construing" constitutional language, irrespective of whether the result is to create or deny new rights?

Justice BARKETT. I think the point that I was trying to make there is there is a slightly different way of interpreting statutes, the plain language of statutes, and in interpreting the plain language of a constitution. In a statute, Congress or the legislature is fairly specific and deals with, in essence, one concept, one sentence, one provision at a time. In constitutions, the language is extremely broad, and although it is a rule of statutory construction that you stop at the plain meaning of a statute, what I was suggesting in the case that you referred to is that when you are looking at constitutions, you have to look at the intent of the entire document more so than trying to attempt to do that in statutes.

For example, if you suggested that the same rule of statutory construction—that is, that you would only apply the literal letter of a constitution, you would then have to say that Congress could make no law affecting religion or rights of free speech and so forth or that a right to trial by jury would mean that you must have a jury in every single case. And I think what occurred when the Supreme Court was looking at those cases and what I was referring to is that you take a look at the intent of the entire document more so than you do in the legislative, specific, narrow language that is being used in one portion of a statute, where the legislature has the opportunity to come back and correct it.

So circumscribe less only in the sense that you take a look at the intent of the framers of the document as opposed to simply stopping with an inquiry of the language if the language gives you an indication that this is not what the framers intended. You have to look at it in conjunction with the other provisions of the constitution.

The CHAIRMAN. Will the Senator yield for a question?

Senator HATCH. Sure.

The CHAIRMAN. Were you in a minority in both these cases?

Justice BARKETT. No, sir. I think *Florida Society of Ophthalmology* was a majority, or almost.

The CHAIRMAN. Was it 5 to 2, you wrote the majority opinion?

Justice BARKETT. Yes.

The CHAIRMAN. Five agreed with you.

Justice BARKETT. Yes, sir.

The CHAIRMAN. And in the *Saliez* case it was 7 to 0?

Justice BARKETT. I believe that is correct.

The CHAIRMAN. Thank you.

Senator HATCH. Well, I do not know the other members of the Florida Supreme Court, and I have not studied their jurisprudence. I have to go by the reasoning of the opinions that——

The CHAIRMAN. I am not being critical. I just want the record to reflect——

Senator HATCH. No, no, but I just want to make this point. I know you are not. I have to go by the reasoning that you have authored, and to a certain extent the opinions you have joined. What I want to know, really, in this discussion is whether your judicial interpretations of Federal questions are consistent with applicable Federal precedent. And if a State court opinion misreads or misuses the Federal equal protection clause and ignores or misapplies principles that are enunciated in U.S. Supreme Court decisions, I do not think it makes any difference how many judges join in the opinion. That is the point. They would all be wrong in that situation.

Frankly, a nominee could be a lone dissenter in a State court case and have the best reasoned opinion in that case. Conversely, a nominee might author or join in the unanimous opinion, and that could be one of the worst opinions ever rendered. And I have seen some of those, too, as have you, I am sure. And I will cite *Plessy v. Ferguson* as a perfect illustration of a case which upheld the odious separate-but-equal doctrine under the equal protection clause, and that was a 7-to-1 decision. So that does not particularly mean anything, and I do not think anyone on this committee would suggest that a nominee who wrote the opinion or voted in the majority in a case like that, you know, would take refuge behind the other seven people.

So these questions go a lot more to the way you judge than they do to the final results in some of these cases. And as I see it, a key premise of your provision is that Constitutions are not easily amended. And in my view, this critical fact clearly counsels strongly against, not in favor of, judicial adventurism in creating new rights.

Justice BARKETT. Well, I think I am not suggesting, Senator, that one goes outside of the document or that one superimposes one's own views on this. I think that the issue here is a very technical question of whether or not—what the requirements were of a procedure in the Florida Legislature. The language, the specific language in and of itself, might have dictated one result. But when one read it in conjunction with other provisions of the constitution, which one may do, under that theory of constitutional interpretation, in order to ascertain the true meaning of the framers with regard to that provision, then that is permissible. As opposed to in statutory construction, if you are taking a look at one subjective line or two in a subsection of a statute, one need not refer to the whole body of all of the congressional acts in order to obtain meaning from it. One stops at the language of that law. That is the only thing I was trying to point out there.

Senator HATCH. Well, the genius of the Constitution, what makes it a living document is not that its meaning is to be judicially altered over time, but, rather, that it gives broad play to the political forces to address the great and the maybe not so great issues of the day. That is I guess the point I am trying to get to.

Let me just address some of your fourth amendment decisions involving drugs. Let me turn to *Bostick v. State*, if you have that handy. That is a decision where you wrote for a 4-3 majority on the court, and, of course, this decision was overturned by the U.S. Supreme Court.

In that case, two officers boarded a bus bound from Miami to Atlanta at a stopover in Fort Lauderdale. They explained they were looking for illegal drugs and asked Bostick to consent to a search of his luggage. And as you noted in your opinion, the trial judge found that Bostick did consent, that the illegal drugs were found.

Now, in your opinion, you created a per se, across-the-board rule that the police practice of boarding buses during scheduled stops and questioning passengers was unconstitutional, and that any consent obtained therefrom was, therefore, void.

Now, the U.S. Supreme Court ruled that the adoption of this rigid per se rule was inconsistent with Supreme Court precedent, which requires that whether or not consent was valid be determined under the totality of the circumstances. And that was the *Schneekloth v. Bustamonte* case in 1973.

Now, the Supreme Court rejected your per se rule. Why did you not find this precedent dispositive and apply this totality of the circumstances test in the first place?

Justice BARKETT. Senator, the U.S. Supreme Court determined in *Bostick*—search and seizure I think is one of the most difficult areas of the law.

Senator HATCH. It is.

Justice BARKETT. And one which all courts, including the U.S. Supreme Court, have grappled with. They made a determination. They interpreted our opinion in *Bostick* to say that any kind of a request for a consensual search on a bus was per se violative of the fourth amendment. They then returned it to us, saying look at this again in light of the totality of the circumstances.

I then looked at it from the perspective of the totality of the circumstances, and finding no dispute as to the circumstances in question, would have found as a matter of law, not because it was a bus but because of all of the totality of the circumstances, that it violated the search and seizure provisions in terms of being a coercive request for consent.

Senator HATCH. But on remand from the U.S. Supreme Court, the Florida Supreme Court finally ruled that the search in that case was lawful.

Justice BARKETT. Yes.

Senator HATCH. But you still did not agree, and you dissented in the second decision. In your original opinion, you made the following comment:

The intrusion upon privacy rights caused by the Broward County policy is too great for a democracy to sustain. Without doubt, the inherently transient nature of drug courier activity presents difficult law enforcement problems. Roving patrols, random sweeps, and arbitrary searches or seizures would go far to eliminate such crime in this State. Nazi German, Soviet Russia, and Communist Cuba have demonstrated all too tellingly the effectiveness of such methods.

Now, I agree that the fourth amendment is the bulwark of our liberties and that there are certain police tactics that cannot be tolerated in our free society. But do you really believe that what the

two officers did here in this particular case, identifying themselves and asking for consent to search the luggage of a bus passenger rather than just taking the luggage and opening it or dragging the passenger off the bus, ought to have been compared to Nazi Germany, Soviet Russia, or Communist Cuba?

Justice BARKETT. Senator, I would never compare the conduct of any of our police officers in this country to those of Nazi Germany or Soviet Russia, and I do not think there is any question but that had I made such a comparison, I would not have received the support of many of the rank-and-file officers in my State.

I think it is clear that they are placed in an inordinately difficult position in terms of understanding what the law is and what the law is not.

In our democratic system, we, of course, as a free society value and have always valued the ability to walk freely in the streets, unless we have forfeited that right by virtue of doing something which violates the law or giving a police officer a reasonable basis to believe that we might have violated the law or probable cause to arrest us for having violated the law.

The bus situation was one in which the State concededly said there was absolutely no reasonable suspicion and no probable cause to stop and inquire of any of these passengers. My understanding of the U.S. Supreme Court's precedent is that one can do that if one does it in a context in which the person feels free to not respond or to say, "I do not want to have a conversation with you." And one must look at the circumstances of the case in order to determine whether or not that citizen felt free.

We are not talking about a situation where there might have been reasonable suspicion to believe that a crime had been committed.

Under the totality of these circumstances, in the crowded bus and the fact that there was only a short stop and the fact that these police officers were wearing their uniforms, had a gun very visible in their pouch and so forth, as delineated by Judge Letz below, it seemed to me that the *Mendenhall* standard would have dictated that this was a coercive situation.

Granted, the Supreme Court has ruled as it has. I would apply that. I think under the circumstances here, as a matter of law, since there was no debate about the circumstances as a matter of law, the fourth amendment was violated. That is what they sent it back for us to do, in my judgment.

Senator HATCH. Well, my only problem was you used that language, and I have to say that nobody is immune from using injudicious language from time to time. Why, even Senator Biden and myself have been known to do that from time to time.

The CHAIRMAN. Once, once.

Senator HATCH. Only once for him. In my case, I am sure a number of times. But you can see why, you know, some police people would be upset with that kind of language. Go ahead.

Justice BARKETT. Senator, this was an issue that was raised during my merit retention campaign. Fortunately for me, many members of the police department took the time to sit down with me, to read the case themselves, and to come to the conclusion that in no way was I attempting to impugn or hold in any less respect

than people in my State know I hold the police. As a result of that meeting, as a result of taking the time to read all of my cases, I had the support of the Police Benevolent Association and many police officers who helped me during my campaign. I think the ones in my State—

The CHAIRMAN. The FOP endorsed you, didn't they?

Justice BARKETT. I am sorry.

The CHAIRMAN. Did the FOP endorse you?

Justice BARKETT. Yes, they did during my—and we had the same kinds of meetings, Senator.

The CHAIRMAN. And the National Association of Police Organizations supports you now; correct?

Justice BARKETT. Yes, sir. And I think that the police officers in my State know that I have nothing but the highest regard for them. They have a very difficult job to do. They are treated very badly, not only by criminals but by many members of our society who do not take adequate care of them in many regards. I value them. I value their input. In my administrative capacity, I have always sought their advice and have conferred with them in a myriad of different ways simply because I think they have a great stake in our court system and they should be consulted. And I do not think there is any question by many of the members of the police in my State that I hold them in such high regard.

What I was trying to point out was that if you leave it unfettered discretion and give absolute power, without guidance, the result is what we have seen in totalitarian countries. I had no intentions of even comparing them in specifics to that.

Senator HATCH. All right. In the recent case called *Sarantopolous*, two police officers received an anonymous tip that Sarantopolous was growing marijuana in his back yard. I think this one was raised with you, but maybe I am wrong. The two officers entered a neighbor's yard, and one of the officers, standing on his tiptoes, looked over a 6-foot tall wood fence and spotted marijuana plants.

The police then went and got a search warrant, and they arrested Sarantopolous, and by a 5-to-2 vote, your court ruled that the search was lawful. The majority said that Sarantopolous lacked a reasonable expectation of privacy in his back yard since it was protected from view only from those who remained on the ground and who were unable to see over the 6-foot fence.

Now, you, in dissent, said,

I cannot believe that American citizens sitting on porches or in their back yards are not constitutionally protected when Government agents, acting only an anonymous tip, climb on ladders or stretch tiptoes to peer over privacy fences.

Now, the question I ask is: Isn't it a settled standard under the fourth amendment that whether a search is constitutional turns not only on whether a person has manifested a subjective expectation of privacy, but whether or not that expectation of privacy is reasonable?

Justice BARKETT. Yes. I think.

Senator HATCH. And I think—

Justice BARKETT. Was that the—I am sorry. I didn't know whether that was the end of the question or not.

Senator HATCH. No, I think you answered it right. That was the question. You answered it right.

The CHAIRMAN. But the issue is, isn't it what is a reasonable expectation?

Senator HATCH. That is right. That is what the issue is.

Now, while it is understandable to wish to keep the Government from looking into our yards, I understand that——

Justice BARKETT. Only on anonymous tips, Senator. That is a factor which I found very significant here.

Senator HATCH. That was what turned it for you? You know, the standard by which you are bound to decide this case turns on what a reasonable expectation of privacy really is. And the majority opinion addressed that applicable legal issue. Your dissent does not meaningfully do so, in my view.

Now, I do not see why it is unreasonable for an American to expect that if he or she is doing something in her or her back yard, whether growing drugs or abusing a child or just reading a newspaper, a 6-foot tall fence would not block all views. And he or she may very well be seen by someone next door. In *Katz. v. U.S.*, this was a 1967 case, there was a two-part inquiry that was posited in that case. First, has the individual manifested a subjective expectation of privacy in the object of the challenged search, and, second, is society willing to recognize that expectation as reasonable. That case did bother me a little bit, but I would be happy to hear whatever you have to say on it.

The CHAIRMAN. I would like to say something.

Senator HATCH. Surely.

The CHAIRMAN. If the fence had been 12 feet high, would it be reasonable expectation? I am asking you, Judge. You obviously think 6 feet is enough. I am asking whether or not would you have ruled the same way, had it been a 1-foot fence?

Justice BARKETT. Probably not, Senator. It is very hard to do this.

Senator HATCH. You felt that 6 feet was the——

The CHAIRMAN. I am just trying to make the point that reasonable, what is subjectively reasonable or objectively reasonable is a matter of a place from which you stand, no pun intended.

Justice BARKETT. There was another element here, and that is whether or not the police were lawfully in the yard. I think there was an element of trespass, and also the concern about the anonymous tip.

Senator HATCH. So those were the factors?

Justice BARKETT. Yes.

Senator HATCH. OK.

Justice BARKETT. Again, we have to view this in the context of how I think the Floridians view their privacy.

Senator HATCH. Sure, and I can appreciate that.

Riley v. State is another one of your criminal law opinions that was reversed by the Supreme Court. In that case, that was the helicopter case, where they were hovering about 400 feet above the ground, if you will recall, and they detected from that height marijuana growing in a greenhouse. They then got a warrant to search the greenhouse and they arrested Riley.

In your opinion, you ruled that the helicopter surveillance of Riley's greenhouse violated the fourth amendment. In determining that Riley had a reasonable expectation of privacy, which is what Senator Biden and I are concerned with, that was invaded by the helicopter surveillance, you sought to distinguish the U.S. Supreme Court's decision in *California v. Ciraolo*, I guess it is. In *Ciraolo*, the Supreme Court held that surveillance from a fixed-wing aircraft flying at 1,000 feet did not violate the fourth amendment. In your words, you said,

We simply cannot dismiss as irrelevant the difference between a fixed-wing aircraft flying at 1,000 feet and a helicopter circling and hovering at 400 feet, so that its occupants can look through an opening in the roof.

The U.S. Supreme Court did reverse your ruling. The plurality and concurring opinions found *Ciraolo* indistinguishable from this helicopter case. In the words of the plurality opinion,

There is nothing in the record or before us to suggest that helicopters flying at 400 feet are sufficiently rare in this country to lend substance to [Riley's] claim that he reasonably anticipated that his greenhouse would not be subject to observation from that altitude.

Now, didn't your attempt at distinction depart from *Ciraolo's* rationale? That is, if the question is whether an expectation of privacy is reasonable, shouldn't you have looked under the principle of *Ciraolo* to whether helicopter flights of 400 feet are legal or common, rather than to compare what can be seen from a helicopter flying at 400 feet compared to a plane at 1,000 feet?

Justice BARKETT. I think, Senator, that the U.S. Supreme Court agreed that one could have a reasonable expectation of privacy from peering helicopters. The issue that the U.S. Supreme Court reversed upon was that the defendant had not presented any evidence or maintained its burden of proof as to whether or not helicopters were used to flying overhead in Pasco County or never flew and, therefore, that was an inquiry that should have been made, which we did not make. *Ciraolo* was as fixed-wing aircraft. This was a unanimous opinion of my court that there should be a bright-line rule for helicopters, based upon a reasonable expectation of privacy.

I recognize that the U.S. Supreme Court has reversed it. I cannot help but add, you say "another of your opinions that the Supreme Court reversed," there were only three, Senator.

Senator HATCH. I did not mean to imply that, so I am glad you corrected me.

Justice BARKETT. They found that in order to establish this, that the defendant has to present proof on this issue, and I accept that. I certainly will follow that on the 11th Circuit, should I have the opportunity to be there.

Senator HATCH. Let me go to *Cross v. State*, which is one of the cases I gave you, which is a 1990 decision. Three detectives, as you will recall, combatting the drug trade spotted Cross at an Amtrak station and asked for permission to search her tote bag, but advised her that she did not have to consent. She consented. Inside the tote bag, they found a hard baseball-shaped object wrapped in brown tape inside a woman's slip.

Now, having seen cocaine packaged like this they say on hundreds of occasions in their combined 20 years of law enforcement

experience, they then arrested Cross, and the contents of the package did indeed prove to be cocaine. By a 5-to-2 vote, the Florida Supreme Court held that probable cause existed for the arrest. You dissented, adopting the reason stated by a judge on an intermediate court, who opined that the taped package did not create probable cause.

Now, in the opinion you adopted as your own, the lower court said,

Based on no more than that the item was tape-wrapped, hard and baseball-shaped, the officer concluded that he had probable cause for a destructive intrusion.

But the police officers testified that, in their experience, they had seen cocaine packaged in that precise way or in that similar way hundreds of times.

Now, what I want to ask you here is why did you fail to acknowledge, much less credit, the experience of the police officers that cocaine is often packaged in that rather unusual manner?

Justice BARKETT. My concern in that case, Senator, was to the quality of the evidence presented. The conclusion of a police officer that it was his experience that this is the way it was does not comport, in my judgment, with evidence, a simple conclusory statement does not comport with the requisite evidence.

Perhaps, though, that case could be read in the context of my opinion in *Doctor v. State of Florida*, where I pointed out a sort of similar kind of situation, where the totality of the circumstance gave the police officer cause to believe that a bulge in the pocket—well, it wasn't the pocket—a bulge on a prospective defendant is not exactly the right term, but you understand what I mean.

Senator HATCH. I understand.

Justice BARKETT [continuing]. Gave probable cause by the feel and by the touch and by the appearance of it to be deemed contraband. In this case, I anticipated before the Supreme Court ruled on the plain field doctrine, not before this case, but before their case, the U.S. Supreme Court had indicated that you could only feel for that which you thought might be a weapon to endanger a police officer. Later on, they decided that if you felt something that you could tell based upon your experience was contraband, that could give you probable cause.

In this case, I pointed out that, as opposed to the facts in *Cross*, the State did provide specific actual basis for the deputy's experience to establish its claim. He testified that he had made approximately 250 arrest—and I am not saying you need to say there has to be 250, but you need to give some factual basis for your conclusions.

In this case, the officer testified as to how many arrests he had made for possession of a controlled substance, he had been present during however many arrests, he had seen or felt it or seen it packaged in this way during those arrests and so forth, and then later on I point out that in this case the totality of the circumstance gave the officer probable cause to believe that he was carrying crack cocaine in this bulge on his person and permitted the search on that basis.

Senator HATCH. I think you were right in that case. I think you are wrong in the other one.

You see, the point I am getting to is not necessarily your batting average, because it has been quite good. There is no reason why anybody is going to jump on you for that, and I am certainly not jumping on you.

Justice BARKETT. I understand.

Senator HATCH. It is not just the one case that bothers me. In looking at these opinions in *Bostick*, *Sarantopolous*, *Riley* and *Cross*, what jumps out at me is a pattern of unduly restrictive search and seizure decisions that would ham-string police in their battle against drugs, you know, if your views had prevailed.

You see, one of my criticisms this year—and I am not trying to be mean to the administration, but I really do not believe that they have been serious about drug policy. We have now passed another deadline where they should have the administration's drug policy to us up here. Frankly, we are seeing the effects—and I do not blame this administration for these problems—the effects of an increased use of drugs all over this country and I am worried about it.

As you can see, I am clearly raising these issues here, because if you look at those cases together, it looks as though that you are taking an unduly lenient stance with regard to curtailing the police in these areas.

Justice BARKETT. I can appreciate your being troubled by the drug trafficking. I come from a State, Senator, where it is an overwhelming problem. But at the same time, in my judgment, there are instances where you have to apply the Constitution, and I attempted to do so. I recognize that you may not feel that the conclusion was correct, but I did attempt to follow the constitutional requirements under the Fourth Amendment.

Senator HATCH. I understand. When I saw those four cases, I thought, my goodness, this does tend to indicate that there is a problem here.

Well, let me go on to *Foster v. Florida*. In that case, the *Foster* case, two young woman and another man, Lanier, drove to a deserted area where one of the women was to make some money by having sex with Lanier. As Lanier, who was very drunk, was dis-robing, Foster suddenly began hitting him and held a knife to his throat and sliced his throat. Foster and the women then dragged a still-breathing Lanier into the bushes and covered him with branches and leaves. Foster then took his knife out and cut Lanier's spine, and then they took his wallet and he and the two women split the money that was in his wallet.

Now, Foster was convicted of murder and sentenced to death in 1975. In his most recent appeal, Foster claimed his death sentence was the product of racial discrimination against black victims. Incidentally, according to the newspaper reports, as I understand it, Foster is white and the victim Lanier was also white.

Now, the majority of your court rejected Foster's claim. Specifically, they determined that Foster's statistical evidence purporting to show the killers of white victims in one country were more likely to get the death penalty than black victim defendants failed to establish a constitutional violation.

In dissent on this point, you relied on the Florida Constitution's Equal Protection Clause to reach a result rejected by the Supreme

Court in *McCleskey v. Kemp*. In *McCleskey*, the court ruled that a capital defendant claiming a violation of the Federal equal protection clause has to show the existence of purposeful discrimination and a discriminatory effect on him. Now, in your opinion, you criticized the *McCleskey* standard for failing to address what you labeled "unconscious discrimination."

Now, you stated your belief that statistical evidence of discriminatory impact in capital sentencing that cannot be traced to blatant or overt discrimination should establish a violation of Florida's equal protection clause. You further stated that this statistical evidence should be construed broadly to include not only analysis of the disposition of first-degree murder cases, but also other information that could suggest discrimination, such as the resources devoted to the prosecution of cases involving white victims as contrasted to those involving minority victims, and the general conduct of a State attorney's office, including hiring practices and the use of racial epithets and jokes.

Now, under your approach, at least as I read it, once the defendant has met that initial burden of showing statistical disparities, the burden shifts to the State to show that the practices in question are not racially motivated.

Let me ask you preliminarily how one aspect of your test would work. You say that the general conduct of a State attorneys office, including hiring practices, would be part of the proof of discrimination in a death penalty case. Now, suppose that 20 percent of the pool of available lawyers are black, but only 10 percent of the State attorneys office prosecutors are black. Under your viewpoint, would that statistical disparity constitute evidence in your view that a white death penalty defendant charged with killing a white victim could cite as part of his or her case racial discrimination in the application of the death penalty in that jurisdiction?

Justice BARKETT. My only concern in *Foster*, Senator, is that there would be a vehicle by which a defendant could assert that the law was being discriminatorily applied against a racial minority. My reading of Supreme Court cases and my reading of our own cases in my State preclude the use of a law to be applied in a racially discriminatory manner.

I did not purport to suggest what proof would be sufficient to overcome that burden, although I recognize that it would have to be a substantial burden of proof, if that claim were to prevail. But the essence of my concerns in *Foster* revolved around providing a process when there was an occasion that a defendant could assert that a particular prosecutor, for example, was only applying the death penalty against black defendants or only when the victims were white or things of that nature.

Senator HATCH. I think that is different from applying statistical disparity. If you read your opinion carefully—well, let me just say I am very concerned that your approach would paralyze the implementation of the death penalty.

Now, I myself have lots of qualms about the death penalty. I would use it very sparingly, and then only in cases where there is absolute proof of guilt, where there is no evidence of discrimination, and where the murder is a particularly heinous murder.

There may be other factors, but those are three that I would want to find in every case.

Let me just add that I am hardly alone in this concern. Many of my Senate colleagues, for example, have voiced similar concerns in opposition to legislation labeled by its advocates as the Racial Justice Act. That legislation, which also developed in reaction to the *McClesky* case decided by the Supreme Court, takes the same or virtually the same statistical approach as your dissent in *Foster*.

During the debate on the so-called Racial Justice Act in 1991, Senator Graham, who spoke eloquently on your behalf today and influentially to me, as did Senator Mack, but Senator Graham had this to say:

The reality is that, by enacting the Racial Justice Act, this Congress, in a bill designed to enhance Federal criminal justice standards, procedures and laws, will destroy the right of a State to impose the death penalty in a constitutional manner. The Racial Justice Act of 1991 might more appropriately be called the Death Penalty Abolition Act of 1991. Seldom has a proposed Federal law gone so far at one time as to unravel first the interest of the States in protecting citizens from murderers, second, to unravel the prosecutorial discretion recognized in every State, and, third, to unravel the jury system.

He goes on to say:

The very nature of the criminal justice program does not lend itself to statistical precision. Each death-eligible decision is inherently individualized and not necessarily subject to being categorized.

Now, as you can see, he and I share the same view on the Racial Justice Act, and we have defeated it consistently in our debates over the crime bills that we have had. Let me just ask you to respond to some criticisms of what your theory was in that case.

For instance, Justice Powell noted in *McClesky* that implementation of murder statutes inherently requires discretion, which he said is essential to the criminal justice process. He explained that this process is unique, and that "the nature of capital sentencing decision and the relationship of the statistics to that decision are fundamentally different from the corresponding elements in [jury pool selection and employment discrimination cases.] In those cases, the statistics relate to fewer entities and fewer variables and are relevant to the challenged decisions."

For example, from the time of his arrest until the time of sentencing, you have independent entities functioning: the prosecutor who decides to seek the death penalty, a defendant who may or may not choose to plea bargain, a judge or jury who have to impose it. It is not the same as one employer hiring plumbers or a court administrator seeking a jury pool or other cases where decisions are readily attributable to one entity.

Justice Powell also said this. He said:

Another important difference between the cases in which we have accepted statistics as proof of discriminatory intent in this case is that, in the [jury pool selection and employment discrimination cases,] the decision-maker has the opportunity to explain the statistical disparity. Here the State has no practical opportunity to rebut the statistical study. Controlling considerations of public policy dictate that jurors cannot be called to testify to the motives and influences that led to their verdict.

Now, he added even further. He said:

Similarly, the policy considerations behind a prosecutor's traditionally wide discretion suggest that the impropriety of law requiring prosecutors to defend their decisions to seek death penalties often years after they were made.

Now, one study—I am sorry this is so long.

Justice BARKETT. That is all right.

Senator HATCH. It is important, because it is a matter of great debate here, as well. Many of us who believe that the death penalty is provided by the Constitution and is important know that the reason for the Racial Justice Act is to knock out the death penalty.

One study you pointed to found, that prosecutors sought the death penalty 27 percent of the time when white victims were involved, and only 14 percent of the time when minority victims were involved. But each and every one of those cases had different facts and different circumstances. They do not seem susceptible to those who really study this area to statistical comparison such as you called for in the *Foster* case.

Go ahead.

Justice BARKETT. I do not think that there is anything in this opinion nor in anything I have written nor in anything I have ever said or feel that suggests that discretion is not a part of this process and has to be a part of the process for many of the reasons that you have enumerated, Senator.

What I think I am saying in this case, however, and what I think the U.S. Supreme Court has said in other contexts, for example, the whole *Swain v. Alabama* and *Batson v. Kentucky* context, is that discretion cannot be used to selectively enforce the law in a racially discriminatory manner. And I do not think there is any dispute about that principle.

The second aspect of your question which I would address is that I have not suggested in this opinion or anywhere else that statistics is the be-all and the end-all of the inquiry. I do believe that perhaps statistics may be something that could be submitted to be included in an offer of proof on this question, but I clearly do not believe that some questions can be resolved only by use of statistical analysis.

And I think that the passage that you read indicates why it would be so troublesome, if you attempted to challenge a whole State's use of statistics or statistics which impact an entire State as dispositive of anything. There are many prosecutors in a State, there are many districts, and so on and so forth.

But when an allegation is made that there is one prosecutor who is unambiguously using his or her discretion in a way to only selectively enforce the law or apply the law in a racially discriminatory manner, there has to be a vehicle in which a person can raise this claim and in which it can be decided.

Senator HATCH. But that was not the claim in the *Foster* case. In this case, you said—I have a LEXIS/NEXIS, I do not know whether you have the same thing I do, so I cannot really tell you the page, but it is near the end of your opinion, I would say about five paragraphs before the end—you say:

I believe that statistical evidence of discrimination in capital sentencing decisions should similarly establish a violation of Article I, section 2 of the Florida Constitution. Statistical evidence should be construed broadly to include not only historical analysis of the disposition of first-degree murder cases in a particular jurisdiction, but also other information that could suggest discrimination, such as the resources devoted to the prosecution of cases involving white victims as contrasted to those involving minority victims—

Justice BARKETT. Exactly.

Senator HATCH [continuing].

And the general conduct of a State attorneys office, including hiring practices and the use of racial epithets and jokes. When racial bias, whether conscious or unconscious, exists in an environment where decisions about seeking the death penalty are made, all aspects of that bias should be available for evaluation by the court in reviewing evidence of discrimination.

That may be in reviewing evidence of discrimination, but not in making the final decision as to whether capital punishment should be imposed.

Justice BARKETT. I think if you continue in the opinion, Senator, you will find that what I am talking about is using all of these things, certainly not exclusively. And as I point out at the very end of the opinion, it is impossible to anticipate the circumstances in which it may be manifested, the trial judge should make a determination, and I suggest a vehicle which provides a specific standard, that is, the defendant has the burden of showing a very strong likelihood of discrimination, and the trial court would then hear whatever evidence, which would not be simply statistical evidence as the only evidence to be considered.

Senator HATCH. As I read the opinion, your standard is very open-ended. For example, a prosecutor's decision as to how much resources to put into the case turns on many subjective factors, amount of investigation, trial preparation, attorney resources needed in the case, as well as available resources.

And since the facts of any set of cases are never alike, how is it possible to draw meaningful comparisons for that kind of statistical analysis?

Justice BARKETT. Suppose, Senator, I guess if you take the best case scenario, that there had been 100 murders in a particular county and 90 of them were against black victims, only 10 against white victims, and the death penalty was sought only in those 10 or only in the one case, where there may be many, many others. All I am trying to suggest to you is I believe there would be a scenario where it would be clear that the death penalty was being applied in a racially discriminatory manner.

The only thing I was suggesting in *Foster* is that there be a vehicle by which one can bring that claim to the court and the court can evaluate it. I was not attempting to suggest, nor do I suggest now, that there is a particular way of making that proof. I was suggesting different ways that certainly could be considered by the trial court.

Senator HATCH. The point I was making is that your standard is a vague, manipulable standard that would absolutely paralyze the death penalty, if it were adopted by courts, under which the burden would be placed upon the State to prove a negative, and that is what bothered me about that case.

Like I say, every murder case is unique. You cannot compare, for example, resources applied between cases or the decision to seek the death penalty in those cases in a meaningfully statistical way and come to a conclusion about racial discrimination. Comparing what happens in two murder cases is like comparing an apple to an orange.

Justice BARKETT. Absolutely.

Senator HATCH. So you feel that if you go on the Circuit Court of Appeals, you would be bound by the *McClesky* case?

Justice BARKETT. I do not think there is any question of that, Senator.

Senator HATCH. The concern that a lot of people that are concerned about your nomination have and who expect these types of questions to be asked is really an evaluation of how Federal precedents are going to be treated by you as a nominee or you as a judge once you reach the Circuit Court of Appeals, whether they are construed narrowly so as to distinguish them in order to reach a desired result in a given case.

That particular opinion, the way it is written—I am not going to hold you to any one single opinion. I would not want to do that. But to me it was telling, in light of claims of your supporters that you have upheld a certain number of death sentences. If your opinion became the law of the land in that case, I cannot conceive of another death penalty case where the death penalty would be enforced or implemented.

I have a real difficult time with the response that the administration provided me on this particular point. But even aside from them, had your approach been applied in these other cases, it is virtually certain that few, if any, death penalties would have been upheld, and that is something that bothers me.

You are having a little bit of difficulty explaining something you claim to be required under the Constitution, and I think you can probably appreciate why I am concerned about that.

Justice BARKETT. Senator, my position has no relevance to making a statewide claim based solely on statistical analysis. I was concerned about a specific charge against a specific prosecutor. It really is a different situation than suggesting that the whole death penalty statute of an entire State would be suspect.

Senator HATCH. You can see why I am concerned. The White House weighed in on this, as I asked some questions about it, and other of your supporters have made statistical claims regarding your death penalty record, in an effort to rebut charges that you may be soft on the death penalty.

In support of the statistical claims, the White House has produced a lengthy table of your death penalty rulings. Let me just take a second or two to respond to their claims. Let me say at the outset that I believe that judges should be judged by the quality of their legal reasoning, and I should also say by their fidelity to the law, which you are saying you will be bound by.

A careful examination of particular opinions is, in the eyes of many, the best particular measurement of these qualities. And it is precisely such an examination that I have conducted and hope to continue with this hearing. By contrast, because the craft of judging lies foremost in the reasoning and not in results, broad statistical compilations of results often obscure far more than they clarify. Unfortunately in this case, the White House's statistic suffer from more than the usual deficiencies.

In the first place, the table of death penalty cases contains pervasive double counting. In particular, where as routinely happens, the Florida Supreme Court addresses both a rule 3.850 post-conviction petition and a habeas petition in the same case, the White

House counts the case as two cases. This double counting has the predictable effect of padding the list of cases in which the White House says that you have voted to enforce the death penalty.

Even more remarkably, it has the perverse effect of including in this list of supposed votes to enforce the death penalty numerous cases in which you have, in fact, voted to grant relief to the petitioning convicted murderer.

Second, the White House list of cases in which you have voted with the majority, according to them, is not limited to those cases in which you have been part of the majority. It includes, for example, a substantial number of cases in which you have refused to join the majority and have instead either dissented in part or relied on grounds significantly more adverse to the death penalty. It also includes a very large number of cases in which, I might add, without offering any explanation, you have merely concurred in the result.

The combined effect of these first two features is, I think, amply illustrated by the fact that a case like *Foster v. State* in which you in partial dissent take a position that would virtually paralyze implementation of the death penalty, the White House listed as a case in which you and the majority are in agreement.

So, you know, I will give you an example: *Melendez v. State*. That is No. 576 on the White House list. It is identified as a case in which the majority and you were in agreement even though you, writing separately in that case, opined that you

Believed that the evidence does not rise to the level of certainty that would support imposition of the death penalty.

Likewise, if one starts running through the list chronologically, three of the very first cases—*Kennedy v. Wainwright*, *Adams v. Wainwright*, and *Thomas v. Wainwright*—you voted to stay the petitioner's execution and the majority did not. But the White House fails to identify this type of disagreement.

There was a third basic flaw in the White House's statistical analysis, and that is that the White House fails to compile, much less analyze, case histories of death-sentence convicts. It is not at all unusual for a death-sentence murderer to make numerous passes through the court system. This point is shown by the fact that the set of 275 occasions on which the White House says that you have voted to enforce the death penalty comprises well under 200 separate convicted murderers, many or most of whom will make yet more passes at escaping their sentence.

Now, in this regard, it bears mention that of these fewer than 200 murderers you would have granted relief even beyond what the court had elsewhere granted or what your positions in yet other cases might dictate to some one-third of them somewhere along the line.

You know, that kind of stuff really bothers me because the White House knows that I want to vote for you. They know that I want to support them. But they make certain statistical claims regarding your death penalty cases and the U.S. Supreme Court.

For instance, they state, for example, that

On eight occasions since 1987, Justice Barkett has voted to impose the death penalty in cases where a majority of the U.S. Supreme Court has voted to vacate that punishment.

But the White House fails to make clear a number of relevant matters. In none of those cases did the U.S. Supreme Court rule that the death sentence could not be imposed or even that resentencing was necessary. Indeed, only one of these eight cases was even argued before the Court. In the other seven cases, the Supreme Court used the procedural device known as the GVR—that is, a grant, vacate, and remand—to enable the State supreme court to consider the possible impact of an intervening U.S. Supreme Court decision.

Now, the Supreme Court liberally uses this GVR device, especially in death cases. A GVR does not necessarily reflect disagreement with the State supreme court's ruling; rather, it simply gives the State supreme court the opportunity to consider the possible application of the intervening U.S. Supreme Court decision.

In one case that was decided on the merits, the Supreme Court remanded so that the Florida Supreme Court could make the basis for its ruling more clear. In seven of these eight cases, the death penalty was imposed on remand from the Supreme Court.

In short, those particular cases provide no meaningful basis for comparison of how you stand in relation to the Supreme Court on the death penalty.

Now, there are some other—I want to give you a—if I could just take 1 or 2 more minutes.

Justice BARKETT. Of course. At your pleasure, Senator.

Senator HATCH. The White House asserts—I am a little irritated with the White House because of some of the statistical analysis they have done and they have put to us up here as reality. They assert that,

In four cases in which Justice Barkett dissented from a death sentence and that case was reviewed by the U.S. Supreme Court, the Court agreed with Justice Barkett and not the Florida Supreme Court majority.

In fact, however, the Supreme Court did not agree with the legal position that you took in any of those four cases, to my knowledge. Instead, it relied on other grounds in summarily vacating the death sentence in one of the cases in issuing GVR's in light of intervening precedent in the other three. And for those same reasons, the White House's claim regarding "the nine instances in which the U.S. Supreme Court has reached a conclusion different from Rosemary Barkett's in a capital case" misses the mark.

I also have to note that the White House fails to consider those cases from other jurisdictions in which the U.S. Supreme Court has rejected the very positions taken by you, Justice Barkett, in other cases. The White House also fails to observe a striking fact that the statistics do show, even if one accepts the White House's—and I think the word is not too strong—loaded numbers, these numbers show that there have been more than 100 occasions on which you have dissented from the Florida Supreme Court's decision to enforce the death penalty. And, by contrast, there has not been one occasion, not one single occasion, to my knowledge—and I think I am right on this; I would like to be shown that I am wrong, but I think I am right—on which you have been in dissent from a majority decision to grant relief to a convicted capital murderer.

Now, that drastic disparity makes all the more telling the White House's refusal to compile or at least to disclose data on any cases

in which even a single Justice has taken a position more favorable to the convicted murderer than yours. And so I emphasize again that I believe that a careful reading of your cases is the best means of examining your record, and I really believe the White House has been very misleading in this statistical analysis of these cases.

Now, I do not expect you to answer this today. I would like you to consider what I have said here, and we will be happy to get you a reprint of what I have just said and see if I am wrong. But I do not think I am. And it bothers me that the White House, knowing that I want to be fair to you and every judicial nominee who comes here, has sent up misleading information. And I am concerned that if your approach in this case becomes law in any way, it will paralyze the death penalty.

Again, I have probably the same qualms you do or many people do about the overuse or misuse of the death penalty. No question about it. Under the standard as you wrote it in that case,

In every capital case involving either a non-white defendant or a white victim, the capital defendant would be able to investigate the general practices of the State attorney's office.

That would paralyze prosecutions in this society. I cannot imagine a more burdensome inquiry than that, and it would tie this country in knots.

Justice Powell pointed out in his opinion in *McCleskey*—and I do not mean to beat this to death, but it is really that important—that there is no reason why your standard would be limited to cases with nonwhite defendants or white victims. There is also no reason why it should be limited to death penalty cases. Your theory would apply equally to robbery, rape, and each and every other crime. And to paraphrase Justice Powell again, to use his words,

McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system.

Now, I have to say that you are not the only one who has thought maybe a statistical approach to this is right. There are many Members of Congress. But they are elected representatives who can be replaced. Once you are on the Circuit Court of Appeals, you really, for all intents and purposes, cannot be replaced. So these are kind of important issues, and I am sorry this takes so long. But as you can see, I am very concerned about them, and I am representative of a lot of people who are concerned. I think the *Dougan* case—I take it the other colleagues went into it, and that is fine with me.

The CHAIRMAN. Senator, can I interrupt for a moment?

Senator HATCH. Sure.

The CHAIRMAN. Is it appropriate if we take a break?

Senator HATCH. I think we should take a break. Unless you want to say something about this?

Justice BARKETT. No—

The CHAIRMAN. You can respond, and then we ought to give you a chance to stretch your legs.

Justice BARKETT. Thank you very much, Senator. I appreciate it very much.

The CHAIRMAN. Let's recess for—before we do, do you have any estimate—I am not pressing you. Do you have any estimate of how much longer you will go?

Senator HATCH. Well, I am trying to—I hope not too much longer. I will also submit some questions in writing to save you time today. But if I could go through a few more, that would be helpful.

The CHAIRMAN. Sure.

Justice BARKETT. I would just as soon resolve everything, any concerns the Senator has today.

Senator HATCH. We appreciate it.

The CHAIRMAN. All right. We will recess for 5 minutes.

Justice BARKETT. Thank you very much.

[Recess.]

The CHAIRMAN. Welcome back, Judge.

Justice BARKETT. Thank you, Senator.

The CHAIRMAN. I am going to just ask one very brief question. Our friend from Iowa, Senator Grassley, is here. He has some questions. I will yield to him, and then I may have questions, and we will go back to the Senator from Utah.

Judge let me ask you a couple broad questions here. I think the questions that Senator Hatch is asking you are totally appropriate, but, again, I think we have to, from my perspective, anyway, look at the broad picture. Regardless of whether or not the statistics that the White House provided—requested by Senator Hatch—are precisely accurately, but let's assume for the sake of discussion they are not, is it beyond any question that you have had before you cases on the death penalty that involved at least 125 individuals, defendants who had been sentenced to death by a lower court and on appeal came up to you?

Justice BARKETT. Yes.

The CHAIRMAN. I know your staff says it is 161. I believe that is the exact number. But let's assume it is not right. But it is at least somewhere between 125 and 150. No one could dispute that. Correct?

Justice BARKETT. Yes. I believe that is correct.

The CHAIRMAN. Now, is it true that you have voted to uphold the death sentence in the vast majority of those appeals that came to you? In other words, of those 125 individuals, the vast majority of them went away with the same sentence they came up to you on and with your vote?

Justice BARKETT. I think what I can say, Senator, is that in 125, as a minimum, different individuals' cases, I have voted to affirm the death penalty. That is correct. I think the cases total—

The CHAIRMAN. So you have affirmed the death penalty a whole heck of a lot more times than you have overruled the death penalty, whether you are in the majority or minority in the court, right?

Justice BARKETT. I think, but I have not personally counted numbers, Senator. What I can tell you is that the U.S. Supreme Court has told us, has mandated, that we very carefully look at cases in which the death penalty has been applied; that the death penalty has to be reserved for the worst of the worst, both in terms of the kind of crime and in terms of the defendant; that the Supreme

Court has returned to us cases where they have said that we have not looked carefully enough to determine if it is, indeed, the worst of the worst; and that I try very conscientiously to apply the law of the United States on that issue and of the Florida courts on that issue. And I neither flinch from applying it when the death penalty is called for, nor do I flinch from vacating it when I think the law requires it. And the numbers are, I guess, significant to show that I have not flinched from imposing it, notwithstanding other people's suggestions to the contrary.

The CHAIRMAN. OK. I do not have any further questions.

Senator Grassley.

Justice BARKETT. Hi, Senator.

Senator GRASSLEY. You are still here.

Justice BARKETT. Yes, sir. Welcome back.

Senator GRASSLEY. You are a strong individual.

There was a case involving the constitutionality of a Senate Joint Resolution 2G. That was the Florida redistricting case. Your court selected from among six different modifications, a portion of the State legislature's redistricting plan regarding Hillsborough County, which the Justice Department had objected to pursuant to the preclearance provisions of the Voting Rights Act. The two largest minorities, I am told, were African Americans and Hispanics.

Writing to express your doubts about the correctness of the majority opinion, you stated that you were

Loath to agree to any of the convoluted plans submitted under these hurried circumstances. If I had to choose only among those presented, however, I would choose the plan submitted by the NAACP simply because this is the organization that had traditionally represented and promoted the position that advances all minority interests.

I suppose it sounds a bit cheeky if I say—and maybe it is meant to be a little, but that point of view expressed about an individual organization is something, I have problems with. It would be like me saying if I were a judge because I am a farmer, that anything the American Farm Bureau Federation argues ought to be preferred.

Do you believe that giving special weight to a position based on who offered it—in this case, the NAACP—rather than on its intrinsic merits is consistent with the judge's duty of impartiality?

Justice BARKETT. Absolutely not. And I do have to set the record straight in terms of the import of your question. I never have nor would I ever decide a case based upon the identity of a party, and I think anybody that knows me at all knows that to be the case.

What I was saying, and concededly very inartfully there, is that we were faced with several reapportionment plans which different parties had submitted. I feel, candidly, very uncomfortable in the position of having to choose a reapportionment plan within a very short period of time. We had all been hoping that the legislature would be able to arrive in a much more expeditious manner than they did upon their ultimate conclusion. But the time constraints involved constitutionally required us to decide this case in a matter of a couple of days and to choose a plan.

The plan which I felt more adequately represented all minority interests was that submitted by the NAACP. What I was attempting to say in that dissent was in rebuttal to a claim that the

NAACP did not adequately represent the interests of African-Americans. And I was trying to rebut that by simply saying clearly the NAACP would not be the plan who would not be responsive to African-Americans. It did include African-Americans in their plan, but it also included Hispanics and more adequately, in my judgment, met the requirements of redistricting and reapportioning in conjunction with that.

I can understand in this case why you would read it the way you would read it. It is inartful, and I wish I had the opportunity to edit that more than anything else that we have been talking about.

Senator GRASSLEY. Well, if you feel the NAACP is representative of minority interests more than any other organization, explain to me how it is more so, in your mind, than any other group representing African-Americans or any Hispanic-American group or any Asian-American group or any Jewish-American group or any other ethnic or religious group you want to put together.

Justice BARKETT. I am not sure I understand the question. All I was attempting to do was rebut the allegation that the NAACP was being insensitive to African-American concerns in their plan.

Senator GRASSLEY. Well, in just a very general way, then, let me ask you for the record: if the NAACP is a party to a voting rights case before you again, can you assure the committee, and future litigants before you, that other parties in that case would not be at some disadvantage because of what seems to be an acknowledged—bias on your part toward the NAACP?

Justice BARKETT. Senator, I have voted against the NAACP when they have been involved in death cases in my court. I have voted for the Republican Party when they have been a party in my court for the NRA. Parties mean absolutely nothing to me. Legal issues are the issues upon which I attempt to base all of my decisions, and the legal analysis set forth by precedent, by what I perceive to be my requirements under the Constitutions that I have sworn to uphold are the things that dictate the solution or the result or the conclusion in any given case. I can certainly assure you of that.

Senator GRASSLEY. So your statement, that the NAACP "has traditionally represented the position that advances all minority interests" is applicable just to that decision? It does not signal any weight that you give to that group on any other issues?

Justice BARKETT. This case involved a very specific plan of reapportionment submitted by the NAACP as a response to the State's attempt to reapportion its districts in conformity with the U.S. law and the dictates to assure adequate representation for all minorities, Senator. The allegation was made by other proponents of other plans that the NAACP plan was not adequately sensitive or did not adequately represent the minority interests of African-Americans.

The sentence to which you refer was intended to rebut the assumption or the presumption or the allegation or the assertion made in the briefs and in the arguments that the NAACP plan did not adequately represent the minority interests of African-Americans. It had nothing to do—the identity of the party had nothing to do with my ultimate decision that their plan more adequately attempted to acknowledge questions of contiguity and representation

and involved other minority interests beyond those just of African-Americans. I attempted to do that.

Senator GRASSLEY. Well, then, let me ask you, because this was a voting rights case, let's say that you in your mind could give that weight to the NAACP in voting rights cases. Why would it not be reasonable, then, to assume if somebody had a case before you, that it would not be given the same weight in a housing discrimination case, an employment discrimination case, public accommodation cases or police brutality cases or in any other type of cases where the NAACP might have a position?

Justice BARKETT. I was not giving weight to the NAACP as an identity, Senator. I was addressing, albeit inartfully, an argument that was being made that the plan was not viable because it did not adequately—was not adequately responsive to the interests of African-Americans. And I was pointing out that the NAACP has traditionally represented the minority interests of African-Americans, and, therefore, that criticism of their plan was not reasonable. I voted for the plan not because it was the NAACP's but because it more adequately than the other plans assured other minorities of equal representation.

Senator GRASSLEY. On another subject, there has been at this hearing some congratulatory talk about the award named after you by the Academy of Florida Trial Lawyers. Now, unlike others that were holding this up as something for you to be honored by, my concerns deal with the propriety of allowing this award to be named after you and what signals it might send.

I would say I have a particular question about how it would relate to the *University of Miami v. Echarte* case, which was discussed earlier. The Academy of Florida Trial Lawyers, submitted an amicus brief in that case in October 1991. The trial lawyers' brief argued that the cap on non-economic damages in medical malpractice cases was unconstitutional. In 1992, the same group of trial lawyers created this award, the Rosemary Barkett Award, to be given each year to a person who, in the view of the trial lawyers, has made an outstanding contribution to the law.

In November 1992, you agreed to present the first annual award at the trial lawyers' annual convention. In May 1993, you in dissent accepted the trial lawyers argument that the cap on non-economic damages was unconstitutional.

Do you believe that it is consistent with your obligation to maintain both the fact and the appearance of impartiality for you to decide a case in which an organization that has named an award for you has filed a brief?

Justice BARKETT. The Academy of Trial Lawyers, as does many other entities, file amicus briefs, Senator, and this award, as I understood it then and as I understand it now, involved a group's commitment not to a particular legal position but a group's commitment to assure that there is equal justice under the law. The first recipient of that award was not a trial lawyer. It was not a lawyer at all. It was Representative Carrie Meek, and it had to do with many of the things that I think I have done outside of the context of substantive law. That is the commitment that I have tried to be true to: to work with children and to provide judicial education, to provide and assure access to courts. Many of the reforms which I

have attempted to implement in order to assure that there is much more access to the courts in a much more comfortable way for the people who use the courts, I think all of those things are what this award attempted to address, and I can only say I am proud that it was given to Representative Meek.

Senator GRASSLEY. OK. Let me ask you if you believe that your conduct on having this award set up for you is——

Justice BARKETT. Excuse me, Senator. I did not have this award set up for me.

Senator GRASSLEY. You did not.

Justice BARKETT. This was not at my suggestion and I had nothing to do with it.

Senator GRASSLEY. I withdraw that statement.

Justice BARKETT. Thank you, Senator.

Senator GRASSLEY. You did not. That is right. But the award was set up. And I want to ask, whether you believe that your conduct was consistent with the ABA Code of Judicial Conduct, Canon 2, Subpart B, stating that a judge "should not lend the prestige of her office to advance the private interests of others, nor should she convey or permit others to convey the impression that they are in a special position to influence her," and Canon 3, Subpart C(1), which states that a judge should "disqualify herself in a proceeding in which her impartiality might reasonably be questioned."

Justice BARKETT. I did not construe—clearly had I in any way, shape, or form thought that this was inappropriate, I would not have participated in it. This I did not deem to have anything to do with the private interests of anyone but that of a group who was attempting to, ancillary to its other interests, assure equal justice, Senator. But I can assure you that if something is deemed to be violative of the canons of ethics, I surely would not engage in that conduct.

Senator GRASSLEY. I note that the trial lawyers scheduled the presentation of your award for the week after your successful retention election. I gather that the creation of the award itself was announced sometime during the retention campaign; is that correct?

Justice BARKETT. I have no idea.

Senator GRASSLEY. I guess one of the reasons I bring this up, might not be totally related to you. But I still remember how a lot of liberal groups in this town, including our liberal press, lambast Clarence Thomas when he wants to appear before some conservative group to make a speech. They just raise Cain with his doing that. And I guess he has decided not to do it on a couple of occasions. He has not followed through.

And yet there is no question about groups like the Trial Lawyers Association setting up awards that might indicate that a judge is part of the system of determining the correct approach to decisions that affect the income of those particular groups.

Senator HATCH. Senator Grassley, could I ask a favor of you? My Governor is in town, and I have to take him over to Senator Nunn's. Could I interrupt for maybe 5 minutes to finish up what I was——

Senator GRASSLEY. Yes, if you can do it in 5 minutes, sure. I will be glad to let you.

Senator HATCH. I will sure try to do it. I just want to finish, and then I will submit some questions in writing about other things that I am concerned about, and that will give you a chance to respond to those that have been raised with others that I am supposed to raise.

Let me just say a final word about the death penalty statistics that we were on with regard to the *Foster* case, and especially—I believe that the White House has attempted to make the death penalty an issue by referring to these statistics whenever one of your death penalty opinions is cited. My concern has nothing to do with your personal view of the death penalty. I have not even asked you your position. Rather, some of your opinions raise important questions about jurisprudence and your fidelity to precedent, and that is what I am interested in. So anything you can give us that will help us in those areas would be appreciated.

I am also concerned that this disparate impact analysis that you embraced in your *Foster* opinion has disturbing implications outside of the sentencing area itself. Your view appears, for example, to lead readily to the adoption of perverse race and sex quotas, and in that regard, let me just ask you about a report issued last year by the Florida Commission on the "Status of Women," of which you were or maybe still are a member.

According to newspaper accounts in the St. Petersburg Times, this report recommended passage of State legislation requiring that all of Florida's decisionmaking boards, councils, and commissions be half male and half female by 1998. According to this article, you as a member of the commission defended it against charges that its report advocated a quota system by saying, "It is not in the context of a quota system. It is simply an acknowledgment that women make up half of the population of this State."

My feeling is if there is a rigid requirement that positions be filled according to population, that is a quota. And I cite Governor Chiles' approach to it, too, because he refused to, as I understand it—according to the Orlando Sentinel Tribune, "Lawton Chiles opposed the commission proposal because he recognized that it would create a quota system." So I am concerned if you agreed with him or feel otherwise.

Justice BARKETT. The goal of every women's group, Senator, that I am aware of and the goal of every minority group is that there be representation in policy-making bodies that are going to affect their lives, whether it is in the private sector or in the public sector. And I think that that is a goal that is laudable. There are many different ways of trying to achieve it, but I do not think that there is any question that it should be achieved, and I am committed to that, if that is your question.

Senator HATCH. Well, I will let it go at that.

Thank you, Senator Grassley, for giving me the time.

Senator GRASSLEY. Yes. I want to move on to another subject, and this will be my last one.

Justice BARKETT. That is okay.

Senator GRASSLEY. It will probably take about—well, you know, it always takes a little longer than I think it will.

Justice BARKETT. It may be because of my long answers. I will try not to be so lengthy, Senator.

Senator GRASSLEY. I want to turn to another area that I have some concern about, and it relates to the fact, as you know, that many communities are very fed up with criminal street activities such as prostitution and drug dealing. And they often respond by enacting anti-loitering statutes aimed at that criminality. In several cases, you have questioned the constitutionality of such statutes.

In *Wyche*, you struck down a statute prohibiting loitering for the purpose of prostitution, citing several constitutional defects in the statute. You used the rule in *Wyche* to strike down a similar statute prohibiting loitering for the purpose of engaging in drug-related activities in *E.L. v. State* and *Holliday v. Tampa*.

In *Wyche*, you said the State could not empower the police to prevent known prostitutes from soliciting their illicit commerce. For authority, you cited "the inherent right to window shop, saunter down the sidewalk, and wave to friends and passers-by with no fear of arrest." I do not know whether you meant to say that those are fundamental rights, but I do not know them to be.

More importantly, I have trouble understanding how you could conclude that a statute prohibiting loitering "in a manner and circumstances manifesting the purposes of soliciting prostitution" could not be construed as requiring criminal intent. Such a holding seems to be contrary to the obligation of any judge to construe statutes to preserve their constitutionality wherever possible.

In your opinion, you claimed that construing the statute in this way would be to "legislate" from the bench,—but wouldn't it have been more consistent with your judicial role to "avoid a holding of unconstitutionality in a fair construction of legislative will to allow." Couldn't you have easily read the statute in *Wyche* as requiring proof of intent to engage in unlawful acts of prostitution?

Justice BARKETT. Senator, the *Wyche* case, again, was decided primarily under Florida law under the due process vagueness standards. The entire court agreed that the statute was defective. The dissent attempted to remedy it. I believe that under our prior cases and under the requirements of our law that that is a function better left to the legislature.

Senator GRASSLEY. I think you are making an argument for judicial restraint. That is one that would be music to my ears. But, don't you also have the responsibility of making an effort to effectuate the intent of the legislature within the confines of the Constitution?

Justice BARKETT. I do not think that the judges should legislate, Senator, which is the essence of what this case suggests. It was found to be defective by the whole court—that is, unconstitutional. I think it is up to the legislature to decide in what manner they want to remedy the statute.

Senator GRASSLEY. Well, at least the work we have done leads us to believe that only two Justices agreed that specific intent could not be read into the statute in *Wyche*, as opposed to the whole court.

Justice BARKETT. The whole court agreed that the statute was defective. What the dissent said is that they could read into it or supply the missing element. The difference that the majority had with the dissent—and I was, of course, with the majority of the

court—was that it is inappropriate to supply an element of the crime, for example, when the legislature has not done so and that it should then be deemed to be unconstitutional, and let the legislature have the opportunity to redraft it in whatever manner they thought appropriate rather than having the judges do it.

Senator GRASSLEY. Well, it seems that it is at odds with an earlier Florida Supreme Court case, *State v. Ecker* which held that an anti-loitering statute was constitutional, citing the court's obligation to try to construe statutes to preserve the constitutionality. In *Wyche* you seem to overrule *Ecker* without even mentioning it.

How do you reconcile your holdings in *Wyche* with your own court's prior ruling in *Ecker*?

Justice BARKETT. Well, it was the majority of my court that joined with me in interpreting the statute or in seeing the statute as defective, as we, in fact, saw it, Senator. And I can only refer you to the analysis and the prior cases cited for the proposition that under Florida's due process vagueness standards this did not pass constitutional muster. As I pointed out, the dissent agreed it did not but just supplied what they thought was missing from the statute, and I think that is not appropriate.

Senator GRASSLEY. We looked at your opinion in *Wyche* and your opinion in *Tal-Mason*. You know the case I am talking about?

Justice BARKETT. Off the top of my head, not—

Senator GRASSLEY. It was a 1987 case. In that case, you cited the court's "clear obligation to interpret statutes in a manner consistent with the constitutional rights whenever possible." You then interpreted language requiring a judge to grant defendants "credit for all the time spent in the county jail before sentence," as including time spent in custody in a State mental hospital. The effect was a convicted murderer was eligible for very early release.

Whether it is the *Wyche* case, the *Ecker* case, the *Tal Mason* case, I guess what I want you to comment on the impression one gets that you use the law selectively to achieve a uniform result—giving the criminal defendant a break. If that is the wrong impression, correct it for me, but that is the impression that I get from those three cases.

Justice BARKETT. I do think that is the wrong impression, Senator, and I think that you cannot take selective cases that are dealing with different aspects of the law and use them for a proposition which is refuted by my entire record when you take a look at it and when you take a look at it in conjunction with how I have voted with the majority and how unanimous our court is.

Tel Mason, now that you have refreshed my memory, had to do with the interpretation of specific statutes where there was ambiguity, and the principle of statutory construction is: When there is ambiguity, then you attempt to decipher what the intent of the legislature is by other means, legislative history and so on and so forth.

When you are talking about an absence of a specific element of a crime that leaves vague, unclear definitions of what conduct is going to be criminalized, that is a constitutional deficiency which I do not think can be remedied except by the legislature in a way in which they choose to do so.

Senator GRASSLEY. Well, I thank you very much.

Justice BARKETT. Thank you, Senator.

Senator GRASSLEY. At the request of the chairman, I am going to recess the committee for a few minutes. How long, I do not know.

Justice BARKETT. I will not go anywhere.

Senator GRASSLEY. We stand in recess.

Justice BARKETT. Thank you very much, Senator.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Judge, it has been a pleasure having you. We are adjourned.

Justice BARKETT. My pleasure, Senator. Thank you.

[Whereupon, at 4:05 p.m., the committee was adjourned.]

[Submissions for the record follow:]

SUBMISSIONS FOR THE RECORD

UNITED STATES SENATE COMMITTEE ON THE JUDICIARY WASHINGTON, DC 20510-6276

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PART I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

Rosemary Barkett

Known as Sister St. Michael, from 1959-1967, during my service in a Roman Catholic religious order

Born as Rosemary Barakat; name changed by order of the circuit court of Dade County in approximately 1967 to correspond to our Miami relatives' name and to our commonly used name.

2. Address: List current place of residence and office address(es).

Office: Florida Supreme Court
500 S. Duval Street
Tallahassee, Florida 32399-1925

Home: 3318 Dartmoor Drive
Tallahassee, Florida 32312

3. Date and place of birth.

Born August 29, 1939, in Ciudad Victoria, Tamaulipas, Mexico. Naturalized on January 22, 1958, at Fort Pierce, Florida.

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Single.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

St. Joseph's College, Jensen Beach, Florida, A.A. degree, 1959.

Spring Hill College, Mobile, Alabama, B.S. degree, summa cum laude, 1967.

University of Florida Law School, Gainesville, Florida, J.D. degree in 1970. Received the J. Hillis Miller Memorial Award, awarded to the outstanding senior graduate.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

1985-present: Chief Justice-Justice, Florida Supreme Court

1984-1985: Appellate Judge, Florida Fourth District Court of Appeal

1979-1984: Trial Judge, Fifteenth Judicial Circuit of Florida

1979: Sole practitioner in West Palm Beach, Florida

1971-1978: Associate and then Partner, Farish & Farish law firm in West Palm Beach, Florida

1960-1968: Taught in elementary and junior high schools, primarily as a member of a Roman Catholic religious community, the Sisters of St. Joseph of St. Augustine, Florida

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No military service.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Received the J. Hillis Miller Memorial Award, awarded to the outstanding senior graduate at the University of Florida Law School.

Was chosen as a member of the University of Florida Law School Moot Court Team.

Honorary Degrees:

- 1992 - Honorary Doctorate of Laws, presented by Nova University, Fort Lauderdale, Florida
- 1992 - Honorary Doctorate of Laws, presented by Rollins College, Winter Park, Florida
- 1990 - Honorary Doctorate of Civil Laws, presented by Spring Hill College, Mobile, Alabama
- 1990 - Honorary Doctorate of Humane Letters, presented by the University of South Florida, Tampa, Florida
- 1990 - Honorary Doctorate of Laws, presented by John Marshall Law School, Chicago, Illinois
- 1987 - Honorary Doctorate of Humane Letters, presented by Florida International University, Boca Raton, Florida
- 1987 - Honorary Doctorate of Laws, presented by Stetson University, St. Petersburg, Florida

Some Other Honors and Awards:

- 1993 - Statewide Distinguished Service Award, Judiciary Category, presented by the Florida Council on Crime and Delinquency
- 1992 - The Rosemary Barkett Award, an award named in my honor and presented each year by the Academy of Florida Trial Lawyers to a person who has demonstrated outstanding commitment to equal justice under the law; "Given in Honor of Chief Justice Rosemary Barkett, the First Woman Justice of the Florida Supreme Court and an Independent and Fierce Defender of Equality for All." The first recipient was Congresswoman Carrie Meek of Florida.
- 1992 - Lifetime Achievement Award, presented by Latin Business and Professional Women
- 1991 - Judge Mattie Belle Davis Award, presented by the Florida Association for Women Lawyers, Dade County
- 1991 - Hannah G. Solomon Award, presented by the National Council of Jewish Women

- 1988 - Achievement Award, presented by the Academy of Florida Trial Lawyers to the outstanding jurist dedicated to the preservation of individual rights and free access to the courts
 - 1986 - Inducted into Florida Women's Hall of Fame
 - 1985 - Woman of Achievement Award, presented by the Palm Beach County Commission on the Status of Women for outstanding contributions in the field of family law and criminal justice
 - 1984 - American Academy of Matrimonial Lawyers Award for the most outstanding contribution to the field of matrimonial law by a member of the judiciary
9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

American Bar Association:

Steering Committee on the Unmet Legal Needs of Children

Unmet Legal Needs of Children Committee,
Families in the Courts Cluster Group, convener,
1993

Judicial Administration Division, Appellate Judges
Conference, Committee on Continuing Appellate
Education

Task Force on Death Penalty Habeas Corpus

Standing Committee on Lawyer Public Service
Responsibility, Subcommittee on Involving the
Judiciary, chair, 1993

The Florida Bar:

Committee on Civil Procedure

Committee on Appellate Rules

Family Law Section

Individual Rights and Responsibilities Committee

Palm Beach County Bar Association

National Association of Women Judges

Florida Association of Women Lawyers

American Judicature Society, Board of Directors, member, 1990-92

Florida State-Federal Judicial Council, chair by virtue of my position as Chief Justice, 1992-93

Academy of Matrimonial Lawyers, fellow

National Association for Court Management

Conference of Chief Justices

Court Statistics and Workload Committee, chair, 1984-89

Children, Families, and the Law National Judicial Council

Child Welfare Study Commission, chair (created by the Florida Legislature), 1989-91

Child Support Study Commission, chair (created by the Florida Legislature), 1986-87

Study Commission on Guardianship Law, chair (created by the Florida Legislature), 1988-89

Florida Bar Foundation:

Board of Directors, 1992-93

Legal Assistance to the Poor Committee

Florida Kids Count Advisory Council

Juvenile Justice Center, board member, 1993

Palm Beach Marine Institute, Inc., chair, 1982-84, and current board member (a marine-related educational and rehabilitative alternative program for juvenile delinquents and problem youths)

Florida Sentencing Guidelines Commission, former member

Florida Commission on the Status of Women

Gender Bias Study Implementation Commission

Statewide Prosecution Function Commission (created by the Florida Legislature)

"The Florida Judges Manual," member of the editorial board, 1985 and 1991

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

To the extent that they lobby, the organizations listed above. I also am a member of the following:

University of Miami School of Law, member of the Visiting Committee

St. Thomas University School of Law, member of the Board of Visitors

Shepard Broad Law Center at Nova University, member of the Board of Governors

University of Florida Center for Governmental Responsibility, member of the Board of Advisors

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Supreme Court of the United States, August 16, 1976

United States Court of Appeals, Fifth Circuit, April 26, 1971

United States District Court, Southern District, April 22, 1971

All Florida courts, March 5, 1971

12. Published Writings: List the titles, publishers, and dates of books, article, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press

reports about the speech, and they are readily available to you, please supply them.

I have attached a speech I gave to the Florida House of Representatives on February 11, 1993. Although I have given many speeches over the years, I only have handwritten notes of same, which are meaningful only to me.

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. Most recent general physical exam was in May of 1993.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

- a. CHIEF JUSTICE, FLORIDA SUPREME COURT. I was chosen by my fellow justices to serve as the Chief Justice of the Florida Supreme Court for a term of two years, commencing July 1, 1992.

The Chief Justice is the chief administrative officer of the state's judicial system, responsible for general supervision of 726 judges and approximately 1,500 support personnel. I am responsible for the direct supervision of the staff of the Office of the State Courts Administrator, as well as staff of the Supreme Court Clerk, Marshal, and Library. I am responsible for overall management of the supreme court's caseload and preside at all proceedings of the court.

I supervise the compilation and presentation of the judicial branch budget to the Florida Legislature, which totals more than \$160 million.

I develop a variety of judicial branch policies and orchestrate their implementation. This includes ongoing policy related to budget, personnel, and purchasing administration; judicial education; and information systems support. Policy development also embraces specialized areas, such as the organization of family divisions in the trial courts, jury management, alternative dispute resolution (mediation and arbitration), guardian ad litem services, and court reporting, among others.

- b. JUSTICE, FLORIDA SUPREME COURT. I was appointed by then-Governor Bob Graham as a justice of the Florida Supreme Court in 1985. In Florida, supreme

court justices are initially appointed by the governor and then are subject to a merit retention vote at the end of every six-year term. The Florida voters have retained me in office during two general elections, in 1986 and 1992.

JURISDICTION, FLORIDA SUPREME COURT. The court must review final orders imposing death sentences, district court decisions declaring a state statute or provision of the state constitution invalid, bond validations, and actions of statewide agencies relating to public utilities.

In addition to these forms of mandatory review authority, the court in its discretion may review any decision of a district court of appeal that expressly declares valid a state statute, construes a provision of the state or federal constitution, affects a class of constitutional or state officers, or directly conflicts with a decision of another district court or of the supreme court on the same question of law. The supreme court may review certain categories of judgments, decisions, and questions or law certified to it by the district courts of appeal and federal appellate courts.

The supreme court has the constitutional authority to issue the extraordinary writs of prohibition, mandamus, quo warranto, and habeas corpus, and to issue all other writs necessary to complete the exercise of its jurisdiction, such as an order to stay lower court proceedings.

The supreme court also renders advisory opinions to the governor, upon request, on questions relating to the governor's constitutional duties and powers.

As the state's highest tribunal, the supreme court also possesses certain distinctive powers that are essential to the exercise of the state's judicial power but that are not, strictly speaking, decision-making powers in contested cases. The court promulgates rules governing the practice and procedure in all Florida courts, subject to the power of the Legislature to repeal any rule by a two-thirds vote of its membership, and the court has the authority to repeal (if five justices concur) any rule adopted by the Judicial Qualifications Commission.

The court has exclusive authority to regulate the admission and discipline of lawyers in Florida. Finally, the court has been assigned the responsibility to discipline and remove judicial officers.

- c. JUDGE, DISTRICT COURT OF APPEAL. I served on the Florida Fourth District Court of Appeal from 1984 through 1985. This position was appointed by then-Governor Bob Graham.

JURISDICTION, DISTRICT COURT OF APPEAL. The jurisdiction of Florida's district courts of appeal extends to appeals from final judgments or orders of trial courts in cases that either are not directly appealable to the supreme court or are not taken from a county court to a circuit court, and to the review of certain non-final orders. By general law, the district courts have been granted the power to review most actions taken by state agencies in carrying out the duties of the executive branch of government. Finally, the district courts have been granted constitutional authority to issue the extraordinary writs of certiorari, prohibition, mandamus, quo warranto, and habeas corpus, as well as all other writs necessary to the complete exercise of their jurisdiction.

- d. JUDGE, CIRCUIT COURT. My first judicial service was on the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County, where I served from 1979 through 1984. I was initially appointed to this office by then-Governor Bob Graham in September of 1979, and in November of 1980, I was elected to a six-year term in an unopposed, non-partisan campaign.

While on the Fifteenth Judicial Circuit, I served as a circuit court judge from 1979 to 1982, as the administrative judge of the civil division from 1982 to 1983, and was elected by our judges in the circuit as the chief judge of the circuit from 1983 to 1984.

A chief judge of the circuit court is responsible for developing and implementing a plan for the efficient and proper administration of all courts within the judicial circuit. Primary administrative duties include caseload management; assignment of supplemental hearing resources such as traffic magistrates, child support hearing

officers, mediators, arbitrators, and general and special masters; development of budgets for submission and the administration of such budgets; general supervision of all court personnel within the circuit; management of all court facilities within the circuit; assignment of court reporters, court interpreters, guardians ad litem, and public guardians.

JURISDICTION, CIRCUIT COURT. Circuit courts have general trial jurisdiction over matters not assigned by statute to the county courts, and also hear appeals from county court cases. Thus, circuit courts are simultaneously the highest trial courts and the lowest appellate courts in Florida's judicial system.

The trial jurisdiction of Florida's circuit courts includes, among other matters, original jurisdiction over civil disputes involving more than \$15,000; controversies involving the estates of decedents, minors, and persons adjudicated to be incompetent; cases relating to juveniles; criminal prosecutions for all felonies; tax disputes, actions to determine the title and boundaries of real property; suits for declaratory judgments; and requests for injunctions to prevent persons or entities from acting in a manner that is asserted to be unlawful. Lastly, circuit judges are also granted the power to issue the extraordinary writs of certiorari, prohibition, mandamus, quo warranto, and habeas corpus, as well as all other writs necessary to the complete exercise of their jurisdiction.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

(1) Citations of significant opinions:

- a) Chiles v. Children A, B, C, D, E, and F, 589 So. 2d 260 (Fla. 1991)

- b) In re Guardianship of Browning, 568 So. 2d 4 (Fla. 1990)
 - c) Department of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991)
 - d) Byrd v. Richardson-Greenshields Securities, Inc., 552 So. 2d 1099 (Fla. 1989)
 - e) State v. Slappy, 522 So. 2d 18 (Fla.); cert. denied, 487 U.S. 1219, 108 S.Ct. 2873, 101 L. Ed. 2d 909 (1988)
 - f) Shriners Hosps. for Crippled Children v. Zrillic, 563 So. 2d 64 (Fla. 1990)
 - g) Joint Ventures, Inc. v. Department of Transp., 563 So. 2d 622 (Fla. 1990)
 - h) Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L. Ed. 2d 681 (1988)
 - i) Foster v. State, 614 So. 2d 455 (Fla. 1992) (concurring in part, dissenting in part)
 - j) Della-Donna v. Gore Newspapers Co., 489 So. 2d 72 (Fla. App. 4 Dist.), review denied, 494 So. 2d 1150 (Fla. 1986), and cert. denied 479 U.S. 1088, 107 S.Ct. 1294, 94 L. Ed. 2d 150 (1987)
 - k) Abramson and Abramson v. Cloister Beach Towers Association, Case No. 78-4363 CA(L)01 B, Fifteenth Judicial Circuit of Florida, in and for Palm Beach County, Florida (not reported), December 17, 1979
- (2) The following are cases in which the United States Supreme Court reversed the Florida Supreme Court's decision in cases in which I wrote the decision for the majority of the court:
- a) In Riley v. State, 511 So. 2d 282 (Fla. 1987), the Florida Supreme Court held that the defendant had a reasonable expectation of privacy in the greenhouse attached to his home and its contents against aerial observations by a police officer flying in a helicopter 400 feet above the ground. Therefore, such observation constituted a "search" under the Fourth Amendment, and accordingly, the evidence seized after the search was properly

suppressed. The United States Supreme Court reversed in a plurality decision, 488 U.S. 445 (1989). See also Riley v. State, 549 So. 2d 673 (Fla. 1989) (on remand).

- b) In Bostick v. State, 554 So. 2d 1153 (Fla. 1989), the issue focused on the Broward County Sheriff's Department's standard procedure of "working the buses" whereby deputies randomly select bus passengers, ask them potentially incriminating questions, and seek their consent to search their belongings. The Court ruled that pursuant to the sheriff's policy, officers unconstitutionally "seized" Bostick and conducted an unlawful search of his baggage. The United States Supreme Court reversed, 111 S. Ct. 2382 (1991), holding that there is no per se rule holding this investigative technique unconstitutional. Instead, each case must be decided on the totality of the circumstances. See also Bostick v. State, 593 So. 2d 494 (1992) (on remand).
- c) In Gaskin v. State, 591 So. 2d 917 (Fla. 1991), we upheld two first-degree murder convictions and death sentences. The United States Supreme Court vacated, 112 S. Ct. 3022 (1992), and remanded for consideration in light of Espinosa v. Florida, 112 S. Ct. 2926 (1992), which invalidated the Florida jury instruction on the heinous, atrocious, or cruel aggravating circumstance. See also Gaskin v. State, 615 So. 2d 679 (Fla. 1993) (on remand), cert. denied, 1993 WL 374902 (U.S. Oct. 12, 1993).
- (3) All of my appellate opinions have been published in the Southern Reporter, Second Series. The following cases are those in which I wrote the majority opinion and which expressly construe provisions of the United States Constitution or the Florida Constitution.

National Distributing Co. v. State Comptroller, 523 So. 2d 156 (Fla. 1988).

Winshare Club v. Dept. of Legal Aff., 542 So. 2d 974 (Fla. 1989).

Poore v. State, 531 So. 2d 161 (Fla. 1988).

- Robinson v. State, 574 So. 2d 108 (Fla. 1988),
cert. denied, 112 S. Ct. 131 (1991).
- State v. Wayne, 531 So. 2d 160 (Fla. 1988).
- Wright v. State, 586 So. 2d 1024 (Fla. 1991).
- DeAvala v. Florida Farm Bureau Cas. Ins. Co.,
543 So. 2d 204 (Fla. 1989).
- Palm Harbor Spec. Fire Cont. Dist. v. Kelly,
516 So. 2d 249 (Fla. 1987).
- Shriners Hosps. for Crippled Children v.
Zrillic, 563 So. 2d 64 (Fla. 1990).
- Rasmussen v. So. Fla. Blood Serv., 500 So. 2d
533 (Fla. 1987).
- Riley v. State, 511 So. 2d 282 (Fla. 1987),
rev'd, 488 U.S. 445 (1989).
- Bostick v. State, 554 So. 2d 1153 (Fla. 1989),
rev'd, 111 S. Ct. 2382 (1991), on remand, 593
So. 2d 494 (Fla. 1992).
- Caplan v. State, 531 So. 2d 88 (Fla. 1988),
cert. denied, 489 U.S. 1099 (1989).
- Robinson v. State, 537 So. 2d 95 (Fla 1989).
- State v. Wells, 539 So. 2d 464 (Fla 1989),
aff'd, 495 U.S. 1 (1990).
- Joint Ventures v. Dept. of Trans., 563 So. 2d
622 (Fla. 1990).
- Florida Star v. B.J.F., 530 So. 2d 286 (Fla.
1988), answering question certified by, 484
U.S. 984 (1987); see also Florida Star v.
B.J.F., 491 U.S. 524 (1989), reversing 499 So.
2d 883 (Fla. 1st DCA 1986), review denied, 509
So. 2d 1117 (Fla. 1987).
- State v. Jones, 488 So. 2d 527 (Fla. 1986).
- State v. Wayne, 531 So. 2d 160 (Fla. 1988).
- Florida Soc. of Ophthalmology v. Florida
Optometric Assoc., 489 So. 2d 1118 (Fla.
1986).

Public Health Trust of Dade Co. v. Lopez, 531 So. 2d 946 (Fla. 1988).

In re Guardianship of Browning, 568 So. 2d 4 (Fla. 1990).

Shaktman v. State, 553 So. 2d 148 (Fla. 1989).

FDLE v. Real Property, 588 So. 2d 957 (Fla. 1991).

State v. Smith, 547 So. 2d 131 (Fla. 1989).

Harris v. Martin Regency Ltd., 576 So. 2d 1294 (Fla. 1991).

State v. Johnson, 561 So. 2d 1139 (Fla. 1990).

Chiles v. Children A, B, C, D, E, & F, 589 So. 2d 260 (Fla. 1991).

Murray v. Lewis, 576 So. 2d 264 (Fla. 1990).

In re Forfeiture of 1969 Piper Navajo, 592 So. 2d 233 (Fla. 1992).

State v. Saiez, 489 So. 2d 1125 (Fla. 1986).

In re Adoption of a Minor Child, 593 So. 2d 185 (Fla. 1991).

Bostick v. State, 593 So. 2d 494 (Fla. 1992), on remand from 111 S. Ct. 2382 (1991).

Doctor v. State, 596 So. 2d 442 (Fla. 1992).

Rose v. State, 601 So. 2d 1181 (Fla. 1992).

Hall v. Dace, 602 So. 2d 512 (Fla. 1992).

Marshall v. State, 604 So. 2d 799 (Fla. 1992), cert. denied, 113 S. Ct. 2355 (1993).

Butterworth v. Caggiano, 605 So. 2d 56 (Fla. 1992).

Power v. State, 605 So. 2d 856 (Fla. 1992), cert. denied, 113 S. Ct. 1863 (1993).

Thomas v. State, 614 So. 2d 468 (Fla. 1993).

Gaskin v. State, 615 So. 2d 679 (Fla. 1993).

cert. denied, 1993 WL 374902 (U.S. October 12, 1993); see also Gaskin v. State, 591 So. 2d 917 (Fla. 1991), cert. granted and judgment vacated, 112 S. Ct. 3022 (1992).

Wyche v. State, 619 So. 2d 231 (Fla. 1993).

Thomason v. State, 620 So. 2d 1234 (Fla. 1993).

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

None.

17. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

Did not serve as clerk to a judge.

2. whether you practiced alone, and if so, the addresses and dates;

Sole practitioner in West Palm Beach, Florida, from January 1, 1979, through August 31, 1979.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

Associate and then partner at the firm of Farish & Farish in West Palm Beach, Florida, from law school graduation in 1971 through December 31, 1978.

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

General civil practice, primarily trial work, both jury and nonjury, with a majority emphasis on personal injury claims. My

practice also encompassed family law, eminent domain, real property, commercial, and to a lesser degree probate, banking, and corporation work.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

I represented individuals, as well as a few corporate clients, including a municipality. Mostly, however, I represented middle income individuals with ordinary legal problems, and higher income clients in dissolutions of marriage. Area of specialty: personal injury litigation.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Appeared frequently in court.

2. What percentage of these appearances was in:

(a) federal courts;

0% (maybe two occasions)

(b) state courts of record;

95%

(c) other courts.

5% (mainly appellate courts, but also administrative agencies in a few cases)

3. What percentage of your litigation was:

(a) civil;

90%

(b) criminal

10%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

The majority of my cases went to trial. At this date (14 years later), there is no way I can determine the precise number of cases I handled, or the percentage that went to trial compared to the percentage that were settled. The bulk of my time, however, was spent bringing cases to trial. We were a small firm with only seven or eight lawyers; consequently, I tried most cases as sole counsel, although, on some occasions, some members of the firm tried cases together.

5. What percentage of these trials was:

(a) jury;

50%

(b) non-jury.

50%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;

(b) the name of the court and the name of the judge or judges before whom the case was litigated; and

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

It is impossible after all these years to reconstruct the "ten most significant litigated matters" which I personally handled. The best I can do is refer you to some of the lawyers with whom and against whom I litigated various types of cases and the judges before whom they were tried, as well as have appeared before me:

John R. Beranek
P. O. Box 11307
Tallahassee, Florida 32302-3307
904/681-7766

Joel D. Eaton
800 City National Bank
25 W. Flagler Street
Miami, Florida 33130-1720
305/358-2800

Lake Lytal, Jr.
Joseph Reiter
Lytal and Reiter
515 N. Flagler Drive, Suite 1000
West Palm Beach, Florida 33402
407/655-1990

Justus Webb Reid
Reid, Ricca & Rigell
P. O. Box 2926
West Palm Beach, Florida 33402
407/659-7700

Robert Montgomery, Jr.
P. O. Drawer 3066
West Palm Beach, Florida 33402
407/832-2880

Earl Denney
Chris Searcy
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33402
407/686-6300

Ronald Sales
1551 Forum Place, Suite 300F
West Palm Beach, Florida 33402
407/686-2333

Sidney A. Stubbs, Jr. and
Adams Weaver
Jones, Foster, et al.
P. O. Drawer E
West Palm Beach, Florida 33402
407/659-3000

Edna Louise Caruso
Barristers Building
1615 Forum Place, Suite 4B
West Palm Beach, Florida 33401-2317
407/686-8010

Larry Alan Klein
Fourth District Court of Appeal
P. O. Box 3315
West Palm Beach, Florida 33402

407/686-1903

Lois Frankel
2161 Palm Beach Lakes Boulevard, #103
West Palm Beach, Florida 33409-6601
407/640-6150

Barry Krischer
Office of the State Attorney
401 N. Dixie Highway
West Palm Beach, Florida 33401-4209
407/355-7270

Jane Kreisler-Walsh
503 Flagler Center
West Palm Beach, Florida 33401-5913
407/659-5455

Some of the judges before whom I tried cases: Judge James Stewart, Judge Thomas Sholts, Judge Robert Hewitt, Judge Hugh McMillan, Judge James Downey, and Judge James Payne, all presently still in West Palm Beach, Florida.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

In addition to the work reflected in the responses to the other questions regarding my bar and professional activities as well as the opinions I have written, I have also contributed to the legal education of the judiciary and others in the legal profession. During my years as a judge, I have regularly participated as faculty at:

National Judicial College (have taught courses on The Jury Trial/Jury Management, Individual and Society, Gender Fairness Faculty Development Workshops)

Florida Judicial College and Florida College of Advanced Judicial Studies (Case Management and Delay Reduction Techniques, Role of the Judge at Trial, Constitutional Law, Jury Trial Management, Judicial Conduct, Common Reasons for Reversals and How to Avoid Them, Labelling Rights and Fundamental Rights)

ABA Appellate Judges Education Seminars
 (Implementing Batson v. Kentucky, Appellate
 Practice Institute, Right to Privacy)

Institute of Judicial Administration, New York
 University, Appellate Judges Seminar (Overview of
 Criminal Law, Bias in the Courts, Collegial
 Decision Making)

Florida State University College of Law (adjunct
 professor in a constitutional law class)

Florida Bar Continuing Legal Education Courses and
 "Bridge the Gap" Seminars (Professionalism in
 Ethics)

Tutored minority law students at Florida State
 University, College of Law

While I was a circuit judge, I worked with the Florida
 Legislature in changing the law to implement shared
 parental responsibility laws. I am now in the process of
 establishing a statewide family court system that will
 assure a more responsive judiciary to the needs of
 today's families in the courts, making them easier and
 more accessible.

PART II.
FINANCIAL DATA AND COMPENSATION

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stocks, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

State retirement benefits, rental income from two condominiums, KEOGH and IRA plans.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

Should a conflict ever arise, I will recuse myself from hearing that particular case. In all instances, I would follow the Canons of Judicial Ethics as they might apply to any circumstance.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government act of 1978, may be substituted here.)

See attached form AO-10.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

Please see attached financial net worth statement.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

None, except for my own non-partisan judicial merit retention campaign in 1992 and in 1986, and as a candidate for election as a trial judge in 1980.

PART III.
GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

During the time that I was in private practice I provided pro bono representation for indigent clients. While on the bench, I have participated, to the extent that judges can, in the activities of pro bono programs, and have felt that all of my participation as reflected in the answers to Questions 9 and 10 was a responsibility that all judges have to serve their profession and their community above and beyond the parameters of their defined duties. Specific projects I have participated in include the ABA Steering Committee on the Unmet Legal Needs of Children, the national Children, Families, and the Law Judicial Council, the Florida Child Support and Florida Child Welfare Study Commissions, the Associated Marine Institutes (which provides rehabilitative alternative programs for juvenile delinquents and problem youth), and the Florida Kids Count project. I have also tutored minority students at Florida State University College of Law.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates--through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

None.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

It is my understanding that several individuals and groups submitted my name for the President's consideration. I was interviewed by representatives of

the ABA and the FBI and was required to fill out informational questionnaires.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-resolution rather than grievance resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Under our constitutional system the governance of the people is shared by three separate branches with distinct roles. The Legislative Branch exercises the responsibility of establishing laws and the Executive Branch exercises the responsibility of executing those laws. The role of the Judicial Branch in this constitutional system is to apply the law and interpret it when necessary in those cases that are appropriately and timely brought before the court.

STATE OF FLORIDA)

COUNTY OF LEON)

AFFIDAVIT

I, Rosemary Barkett, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

Oct 14, 1993

DATE

NAME

Rosemary Barkett

The foregoing instrument was acknowledged before me on this 14th day of October, 1993, by Rosemary Barkett, who is personally known to me and who did take an oath.

OFFICIAL NOTARY SEAL
CHET KAUFMAN
NOTARY PUBLIC STATE OF FLORIDA
COMMISSION NO. CC221147
MY COMMISSION EXP. AUG. 11, 1996

NOTARY

Chet Kaufman

FINANCIAL STATEMENT
NET WORTH

ROSEMARY BARKETT
261-54-4014 (social security no.)

Provide a complete, current financial net worth statement which itemizes in detail all assets (including accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	6500.00	Notes payable to banks-secured	
US Government securities-add schedule		Notes payable to banks-unsecured	
Listed securities-add schedule		Notes payable to relatives	
Unlisted securities-add schedule		Notes payable to others	
Total Securities (see Form AO-10 attached)	833000.00		
Accounts and notes receivable:		Accounts and bills due	3000.00
Due from relatives and friends		Unpaid income tax	
Due from others		Real estate mortgages payable-add schedule (see attached Form AO-10)	374600.00
Doubtful	25000.00	Chattel mortgages and other liens payable	
Real estate owned-add schedule (see Form AO-10 attached)	850500.00	Other debts-itemize:	
Real estate mortgages receivable		Auto lease payments	4920.00
Autos and other personal property	75000.00		
Cash value-life insurance			
Other assets-itemize:		Total Liabilities	382520.00
		Net Worth	1407480.00
Total assets	1790000.00	Total Liabilities and Network	1790000.00
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor		Are any assets pledged? (add schedule)	No
On leases or contracts		Are you defendant in any suits or legal actions?	No, other than as a member of the Court
Legal Claims		Have you ever taken bankruptcy?	No
Provision for Federal Income Tax			
Other Special Debt			

AO-10
Rev. 1/79

FINANCIAL DISCLOSURE REPORT

Report Required by the Ethics
Reform Act of 1989, Pub. L. No.
101-194, November 30, 1989
(5 U.S.C.A. App. 6, §§101-112)

1. Person Reporting (last name, first, middle initial) Barkett, Rosemary		2. Court or Organization Nominated to the U.S. Court of Appeals for the Eleventh Circuit		3. Date of Report 9/24/93
4. Title (Article III Judges indicate active or senior status; Magistrate Judges indicate full- or part-time) presently Chief Justice of the Florida Supreme Court		5. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date <u>9/24/93</u> ____ Initial ____ Annual ____ Final		6. Reporting Period 1/1/92-8/30/93
7. Chambers or Office Address presently 500 South Duval Street, Tallahassee, Florida 32399-1925		8. On the basis of the information contained in this Report, it is, in my opinion, in compliance with applicable laws and regulations ____ Reviewing Officer Signature _____		
IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on last page.				

I. POSITIONS. (Reporting individual only; see pp. 7-8 of Instructions.)

POSITIONNAME OF ORGANIZATION/ENTITY☐

NONE (No reportable positions)

Please see attached

II. AGREEMENTS. (Reporting individual only; see p. 8-9 of Instructions.)

DATEPARTIES AND TERMS☐

NONE (No reportable agreements)

The only "agreements" that seem to possibly fall within this definition
would be under section (d), to wit, my deferred compensation plan and
retirement plan with the State of Florida and the KEOGH plan left over
from my law practice.

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 9-12 of Instructions.)

DATESOURCE AND TYPEGROSS INCOME

(Honoraria only)

(yours, not spouse's)

☐

NONE (No reportable non-investment income)

1993 (to date)	State of Florida Judicial Salary	\$ 66,962.00
1992	State of Florida Judicial Salary	\$ 100,443.00
1992	State of Florida Adjunct Professor Salary (for one semester)	\$ 4,500.00
1991	State of Florida Judicial Salary	\$ 100,443.00
		\$

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

Barkett, Rosemary

Date of Report

9/24/93

IV. REIMBURSEMENTS and GIFTS - transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp.13-15 of Instructions.)

SOURCEDESCRIPTION☐

NONE (No such reportable reimbursements or gifts)

EXEMPT

1

EXEMPT

2

3

4

5

6

7

8

V. OTHER GIFTS.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp.15-16 of Instructions.)

SOURCEDESCRIPTIONVALUE☐

NONE (No such reportable gifts)

EXEMPT

1

EXEMPT

2

\$

3

\$

4

\$

\$

VI. LIABILITIES.

(Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp.16-18 of Instructions.)

CREDITORDESCRIPTIONVALUE CODE*☐

NONE (No reportable liabilities)

1

Barnett Bank, Jacksonville, FL

Real estate mortgage

L

2

First Union Bank, West Palm, FL

Real estate mortgage

K

3

Rosencrans, Lake Park, FL

Real estate mortgage

N

4

Delamar Corp, Boca Raton, FL

Real estate mortgage

K

5

1st Federal S&L, West Palm, FL

Real estate mortgage

J

6

Farm Credit, Homestead, FL

Real estate mortgage

N

* VALUE CODES: J = \$15,000 or less K = \$15,001 to \$50,000 L = \$50,001 to \$100,000 M = \$100,001 to \$250,000
 N = \$250,001 to \$500,000 O = \$500,001 to \$1,000,000 P = More than \$1,000,000

FINANCIAL DISCLOSURE REPORT (cont'd)	Name of Person Reporting Rosemary Barkett	Date of Report September 24, 1993
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VII. INVESTMENTS and TRUSTS -- income, value, transactions.

	A. Description of Assets	B. Income During Reporting Period		C. Gross Value at End of Reporting Period		D. Transactions During Reporting Period
		(1) Amount Code (A-M)	(2) Type (e.g., div., rent or int.)	(1) Value Code (J-K)	(2) Value Method (A-M)	
51*	Advanced Biotherapy Concepts 1000 shares	A (none)	N/A	J	T	Exempt
	Aetna Deferred Comp. Plan	B	div.	L	T	Exempt
603	Ahmanson 1000 shares (sold 2/13/92)	A	div.	J none	N/A	Exempt
603	Alico Inc (ALCO) 500 shares	A	div.	J	T	Exempt
603	American Capital (tax exempt mutual fund) 2291.802 units	A	N/A	K	T	Exempt
603	Aura System (AURA) 1000 shares	A	N/A	J	T	Exempt
43	Barnett Bank (BBI) 200 shares	A	div.	J	T	Exempt
PW	Bayou Steel (BYX) 200 shares	A none	N/A	J	T	Exempt
603	Boynton Beach (muni bond) 100000 units (Zero Coupon Bond)	A (none)	N/A	K	T	Exempt
51	Broward County Res Rec Rev (muni bond) 10000 units	B	int.	J	T	Exempt
603	Broward County School Board (muni bond) 15000 units	A	int.	K	T	Exempt

Income/Gain Codes:	A=\$1,000 or less (Col. B: 4-54)	B=\$1,001 to \$2,500 \$25,000 to 100,000	C=\$2,501 to \$5,000 \$50,000 to 1,000,000	D=\$5,001 to 15,000 More than \$1,000,000
Value Codes:	J=\$15,000 or less (Col. C: 4-53)	K=\$15,001 to 50,000 \$250,001 to 1,000,000	L=\$50,001 to 100,000 \$1,000,001 to 250,000	M=\$250,001 to 250,000
Value Method Codes:	D=Other, SEC (Col. D2)	F=Other, SEC, 601/602 V=Other	G=Other, 603/604 W=Calculated	H=Other, 605/606

*The numbers in the left column are my personal account numbers and should be disregarded.

51	Capital Realty Investors Tax Exempt Fund (CRL) 400 shares (lmted partnership)	A (none)	N/A	J	T	Exempt
35	CATS Series U 20000 units (Zero Coupon)	A (none)	N/A	J	T	Exempt
603	Claire Stores 1000 shares (sold 1992)	A	div.			
PW	Coca Cola (KO) 45 shares	A	N/A	J	T	Exempt
603	Colonial High Income Municipal Trust Fund (CXE) 1000 shares	B	div.	J	T	Exempt
603	Columbia Labs (COB) 500 shares	A (none)	N/A	J	T	Exempt
51	Connecticut State (muni bond) 10000 units (sold 7/1/92)	B	int.	N/A	N/A	Exempt
603	Dade County GTD (muni bond) 100000 units (Zero Coupon)	A (none)	N/A	K	T	Exempt
603	Dade County GTD (muni bond) 50000 units (Zero Coupon)	A (none)	N/A	J	T	Exempt
603	Dallas Utility (muni bond) 75000 units (Zero Coupon)	A (none)	N/A	K	T	Exempt
603	Delta Air Lines (DAL) 300 shares	A (none)	N/A	K	T	Exempt
51	Esco Electronics (ESE) 1000 shares stock	A (none)	N/A	J	T	Exempt
603	Florida State Bd Ed Cap Outlay (muni bond) 100000 (Zero Coupon)	A (none)	N/A	K	T	Exempt
603	Franklin Tax Free (mutual fund) 1185.815 units	A	reinv. shares	J	T	Exempt
603	Freeport McMoran (FMR) 1000 units	C	roy- alty	J	T	Exempt
PW	Genentech Inc. (GNE) 100 shares	A (none)	N/A	J	T	Exempt
603	Geo. L. Smith-Ga Ctr (muni bond) 25000 units	C	int.	K	T	Exempt
PW	Hanger Orthopedic Group (HGR) 250 shares	A (none)	N/A	J	T	Exempt
51	Hawaii State (muni bond) 10000 units	B	int.	J	T	Exempt

*The numbers in the left column are my personal account numbers and should be disregarded.

603	Hillsborough County (muni bond) 10000 units	B	int.	J	T	Exempt
603	Household Int'l 2000 shares (sold 1992)	A	div.			
35	Hyperion (HTT) 600 shares	A	div.	J	T	Exempt
603	Jacksonville Health Authority (muni bond) 20000	C	int.	K	T	Exempt
603	Jundt Growth Fund (sold 1992)	A	div.			Exempt
43	Kemper Multimarket Income Trust (KMM) 1000 shares	A	div.	J	T	Exempt
43	Krupp Cash Plus II 200 units (lmted partnership- real estate)	A (none)	N/A	J	T	Exempt
35	Krupp Institutional Mtg Fund 4 units (lmted partnership)	A	distr.	J	T	Exempt
603	Latin America Fund	A	reinv. shares	J	T	Exempt
43	Lincorp 100 shares	A (none)	N/A	J	T	Exempt
603	Lucas-Northgate Ohio (muni bond) 20000 units	C	int.	K	T	Exempt
35	MFS Govt. Mkts Income Trust (MGF) 200 shares	A	div.	J	T	Exempt
603	MFS High Yield Mun Bd Fund (mutual fund) 3385.332 units	B	reinv. shares	K	T	Exempt
35	MFS Lifetime Govt Mtg Fund (mutual fund) 448.679 units	A	int.	J	T	Exempt
51	MFS Multimarket Trust (MMT) 500 shares	A	div.	J	T	Exempt
	Nationwide	B	div. shares	L	T	Exempt
51	New Jersey (muni bond) 10000 units	B	int.	J	T	Exempt

*The numbers in the left column are my personal account numbers and should be disregarded.

51	N. Palm Beach County Water Control District #18 (muni bond) 10000 units	B	int.	J	T	Exempt
51	N. Palm Beach County Water Control District #23 (muni bond) 10000 units	B	int.	J	T	Exempt
603	N. Palm Beach County Water Control District #24-A (muni bond) 30000 units	C	int.	K	T	Exempt
603	N. Palm Beach County Water Control District #31 (muni bond) 25000 units	C	int.	K	T	Exempt
43	Novell, Inc. (NOVL) 900 shares	A (none)	N/A	J	T	Exempt
43	Office Depot (ODP) 150 shares	A	N/A	J	T	Exempt
603	Port Everglades Port Authority (muni bond) 50000 units (Zero Coupon Bond)	A (none)	N/A	K	T	Exempt
603	Port Everglades Port Authority (muni bond) 50000 units (Zero Coupon Bond)	A (none)	N/A	K	T	Exempt
603	Port Orange Water & Sewer (muni bond) 100000 (Zero Coupon Bond)	A (none)	N/A	K	T	Exempt
43	Prime Plus (1td partnership -- real estate) 40 units	A (none)	N/A	K	T	Exempt
51	Prudential Utility Fund (mutual fund) 518.857 shares	A	reinv. shares	J	T	Exempt
51	Rapid American (corporate bond) 5000 units	A (none)	N/A	J	T	Exempt
603	Rayonier Timberlands (LOG) 500 units	A (none)	N/A	K	T	Exempt
43	Resource Mtg Capital (RMR) 1000 shares (sold 3/29/93)	B	div.	J none	T	Exempt
43	RJR Nabisco Holding Corp. 500 shares	A (none)	N/A	J	T	Exempt

*The numbers in the left column are my personal account numbers and should be disregarded.

603	S. Indian River Water Control (muni bond) 25000 units	C	int.	K	T	Exempt
603	S. Indian River Water Control Sect 15 (muni bond) 25000 units	A (none)	N/A	K	T	Exempt
51	S. Indian River Water Control (muni bond) 10000 units	B	int.	J	T	Exempt
51	Safeguard Scientifics (SFE) 500 shares	A (none)	N/A	J	T	Exempt
603	Sarasota County (muni bond) 100000 units	A (none)	N/A	K	T	Exempt
51	Skandia (annuity)	B	div.	K	T	Exempt
51	Smith Barney (money market fund) 45598 units	B	div. in shares	K	T	Exempt
35	Smith Barney Retirement (money market fund) 826 units	A	div. in shares	J	T	Exempt
43	Smith Barney Retirement (money market fund) 7176 units	A	div. in shares	J	T	Exempt
603	Smith Barney Utility (mutual fund) 2401.927	B	reinv. shares	K	T	Exempt
603	Smith Corona 1000 shares (sold 1992)	A	div.			
51	Software Toolworks (TWRX) 500 shares stock	A (none)	N/A	J	T	Exempt
603	Sunrise Utilities (muni bond) 30000 units (zero coupon bond)	A (none)	N/A	J	T	Exempt
603	Tax Free Money Fund (money market fund) 85760 units	D	div. in shares	L	T	Exempt
603	Van Kampen Merritt Munic. Trust 2000 (sold 2/7/92) .	B	int.		T	Exempt
51	Vantage Cash Port. (money market fund) (sold 1992)	B	div.		T	Exempt
603	W Coast Regl Wtr (muni bond) 80000 units	A	N/A	K	T	Exempt
PW	Walt Disney (DIS) 100 shares	A (none)	N/A	J	T	Exempt

*The numbers in the left column are my personal account numbers and should be disregarded.

51	Westin Hotel (ltd partnership) 10 units	A (none)	N/A	J	T	Exempt
43	Wolverine 1000 shares	A (none)	N/A	J	T	Exempt
	Real Estate - Parcel 1 Tallahassee, Florida	A (none)	N/A	L	T	Exempt
	Real Estate - Parcel 2 Lake Park, Florida	A (none)	N/A	N	T	Exempt
	Real Estate - Parcel 3 Lake Park, Florida	A (none)	N/A	M	T	Exempt
	Real Estate - Parcel 4 Lake Worth, Florida	C	rent	K	T	Exempt
	Real Estate - Parcel 5 Jupiter, Florida	C	rent	K	T	Exempt
	Real Estate - Parcel 6 Homestead, Florida	C	ag. sales	L	T	Exempt
	Real Estate - Parcel 7 Homestead, Florida	C	ag. sales	L	T	Exempt

The numbers in the left column are my personal account numbers and should be disregarded.

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

Rosemary Barkett

Date of Report

9/24/93

VIII. ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate part of Report.)

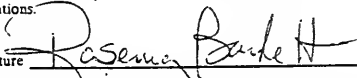
IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C.A. app. 7, § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature



Date

9/24/93

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C.A. APP. 6, § 104, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Judicial Ethics Committee
Administrative Office of the
United States Courts
Washington, DC 20544

FINANCIAL DISCLOSURE REPORT

BARKETT, ROSEMARY
DATE OF REPORT: 9/24/93

I. POSITIONS

Florida Bar Foundation Board of Directors, member

Juvenile Justice Center, board member

Palm Beach Marine Institute, Inc., former chair; board member (a marine-related educational and rehabilitative alternative program for juvenile delinquents and problem youths)

American Judicature Society, board member

Institute of Judicial Administration, New York University,
Appellate Judges Seminar, faculty member

One-half partner in the ownership of a rental condominium in Lake Worth, Florida

One-fourth partner in the ownership of a rental condominium in Jupiter, Florida

One-third partner in the ownership of a 10-acre avocado grove in Homestead, Florida

One-half partner in the ownership of a 10-acre avocado grove in Homestead, Florida

In the interest of full disclosure, I am also attaching my resume listing all other memberships in the event they may be encompassed in this question.

ROSEMARY BARKETT
 Chief Justice, Florida Supreme Court
 Tallahassee, Florida 32399-1925
 Telephone 904/488-0357

JUDICIAL EXPERIENCE

FLORIDA SUPREME COURT

1992 - present, Chief Justice
 1985 - present, Justice

FOURTH DISTRICT COURT OF APPEAL, STATE OF FLORIDA

1984 - 1985, Appellate Judge

FIFTEENTH JUDICIAL CIRCUIT, STATE OF FLORIDA

1983 - 1984, Chief Judge
 1982 - 1983, Administrative Judge, Civil Division
 1979 - 1982, Circuit Judge

LEGAL EXPERIENCE

1971 - 1979, Private civil and trial law practice, West Palm Beach, Florida

OTHER PROFESSIONAL EXPERIENCE

Former Teacher in Elementary and Junior High Schools,
 Primarily as a Member of a Religious Teaching Order

PERSONAL

Born August 29, 1939, in Ciudad Victoria, Tamaulipas, Mexico
 Naturalized January 22, 1958, at Fort Pierce, Florida

EDUCATION

University of Florida Law School, Gainesville, Florida,
 1970, J.D.
 Spring Hill College, Mobile, Alabama, 1967, B.S., Summa Cum Laude

HONORARY DEGREES

1992 - Honorary Doctorate of Laws, presented by Nova University
 1992 - Honorary Doctorate of Laws, presented by Rollins College
 1990 - Honorary Doctorate of Civil Laws, presented by Spring Hill College
 1990 - Honorary Doctorate of Humane Letters, presented by University of South Florida
 1990 - Honorary Doctorate of Laws, presented by John Marshall Law School
 1987 - Honorary Doctorate of Humane Letters, presented by Florida International University
 1987 - Honorary Doctorate of Laws, presented by Stetson University

COMMITMENTS / ASSOCIATIONS (former and current)

AMERICAN BAR ASSOCIATION

Families in the Courts Cluster Group, convener
 Committee on Continuing Appellate Education, member
 Task Force on Death Penalty Habeas Corpus, member
 Standing Committee on Lawyer Public Service
 Responsibility, member

FLORIDA BAR

Committee on Civil Procedure, liaison/member
 Committee on Appellate Rules, liaison/member

FLORIDA BAR FOUNDATION

Board of Directors, member
 Legal Assistance to the Poor Committee, member

CHILDREN, FAMILIES, AND THE LAW JUDICIAL COUNCIL, member

CHILD WELFARE STUDY COMMISSION, chair

Commissioned by the Florida Legislature

CHILD SUPPORT STUDY COMMISSION, chair

Commissioned by the Florida Legislature

STUDY COMMISSION ON GUARDIANSHIP LAW, chair

Commissioned by the Florida Legislature

FLORIDA KIDS COUNT ADVISORY COUNCIL, member

JUVENILE JUSTICE CENTER, board member

PALM BEACH MARINE INSTITUTE, INC., former chair; board member (a
 marine-related educational and rehabilitative
 alternative program for juvenile delinquents and
 problem youths)

NATIONAL ASSOCIATION OF WOMEN JUDGES, member

FLORIDA COMMISSION ON THE STATUS OF WOMEN, member

GENDER BIAS STUDY IMPLEMENTATION COMMISSION, member

FLORIDA ASSOCIATION OF WOMEN LAWYERS, member

ACADEMY OF MATRIMONIAL LAWYERS, fellow

NATIONAL ASSOCIATION FOR COURT MANAGEMENT, member

AMERICAN JUDICATURE SOCIETY, board member

COURT STATISTICS AND WORKLOAD COMMITTEE, former chair; liaison

SENTENCING GUIDELINES COMMISSION, member

Commissioned by the Florida Legislature

STATEWIDE PROSECUTION FUNCTION COMMISSION, member

Commissioned by the Florida Legislature

MAJOR HONORS AND AWARDS

- 1993 Breaking the Glass Ceiling Award, presented by the Florida Federation of Business and Professional Women's Clubs, Inc.
- 1992 The Rosemary Barkett Award, Presented Each Year by the Academy of Florida Trial Lawyers to a Person Who Has Demonstrated Outstanding Commitment to Equal Justice Under the Law; Given in Honor of Chief Justice Rosemary Barkett the First Woman Justice of the Florida Supreme Court and an Independent and Fierce Defender of Equality for All
- 1992 Latin Business and Professional Women Lifetime Achievement Award
- 1992 ABA Minority Justice Award Honoree
- 1991 Judge Mattie Belle Davis Award, presented by the Florida Association for Women Lawyers, Dade County
- 1991 Hannah G. Solomon Award, presented by National Council of Jewish Women
- 1988 Achievement Award, presented by the Academy of Florida Trial Lawyers for outstanding jurist dedicated to the preservation of individual rights and free access to the courts
- 1986 Inducted into Florida Women's Hall of Fame
- 1986 Judicial Achievement Award for the State of Florida, presented by the Association of Trial Lawyers of American in recognition of outstanding efforts as a lawyer and a jurist championing and protecting the rights of the individual
- 1985 Woman of Achievement Award, presented by the Palm Beach County Commission on the Status of Women for outstanding contributions in the field of family law and criminal justice
- 1984 American Academy of Matrimonial Lawyers Award for the most outstanding contribution to the field of matrimonial law by a member of the judiciary
- 1970 J. Hillis Miller Memorial Award (awarded to outstanding senior graduate), University of Florida Law School

TEACHING AND ADVISORY POSITIONS (former and current)

NATIONAL JUDICIAL COLLEGE, faculty member

FLORIDA JUDICIAL COLLEGE, faculty member

AMERICAN BAR ASSOCIATION APPELLATE JUDGES CONTINUING EDUCATION
SEMINARS, faculty member

INSTITUTE OF JUDICIAL ADMINISTRATION, NEW YORK UNIVERSITY,
APPELLATE JUDGES SEMINARS, faculty member

FLORIDA STATE UNIVERSITY COLLEGE OF LAW, adjunct professor,
Constitutional Law Class

"THE FLORIDA JUDGES MANUAL"
Editorial Board, member

UNIVERSITY OF MIAMI SCHOOL OF LAW
Visiting Committee, member

ST. THOMAS UNIVERSITY SCHOOL OF LAW
Board of Visitors, member

SHEPARD BROAD LAW CENTER AT NOVA UNIVERSITY
Board of Governors, member

UNIVERSITY OF FLORIDA CENTER FOR GOVERNMENTAL RESPONSIBILITY
Board of Advisors, member

BAR AND COURT ADMISSIONS

Admitted to The Florida Bar; Supreme Court of United States;
United States Court of Appeals, Fifth Circuit; United States
District Court, Southern District; All Florida Courts

SENATOR HATCH

WRITTEN QUESTIONS FOR CHIEF JUSTICE BARKETTPorter v. State, 564 So.2d 1060 (Fla. 1990)

Porter was the live-in companion of Evelyn Williams. Their stormy relationship was marked by several violent incidents, including Porter's threat to kill Williams and her daughter. Porter then left town for a few months, during which time Williams established a relationship with another man, Burrows.

When Porter returned to town, Williams refused to see him. Porter contacted Williams' mother, who told him that Williams did not wish to see him anymore. A few days before the murders, Williams asked to borrow a gun from a friend; the friend declined, but the gun vanished from his home. Porter told another friend that she would be reading about him in the newspaper. During each of the two days before the murder, Porter was seen driving past Williams' home. Then, the morning after a night of heavy drinking, Porter invaded Williams' home, shot her to death, threatened to kill her daughter, and then killed Burrows in a scuffle. Porter pled guilty to the two murders, and was sentenced to death for the murder of Williams.

By a vote of 5 to 2, the Florida Supreme Court affirmed the death sentence. Among other things, the majority noted that it was "clear that [Porter] contemplated this murder well in advance." You, joined by Justice Kogan in dissent with respect to the death sentence, characterized the killing as arising "from a lovers' quarrel or domestic dispute," and concluded that the cold-calculated-and-premeditated aggravator had therefore not been met and that the death penalty was disproportionate.

1. Since the relationship between Porter and Williams had ended months before and since they no longer shared the same home, I am puzzled by your description of the murder as arising from "a lovers' quarrel or domestic dispute." When in your view can ex-lovers be held fully accountable for violence that they inflict on one another?

King v. State, 514 So.2d 354 (Fla. 1987)

While an inmate at a work-release correctional facility, King killed an elderly woman and robbed and burned her home. He was convicted of first-degree murder and was sentenced to death. The conviction and death sentence were affirmed on direct appeal, and his state postconviction petition was denied. On federal habeas, he obtained resentencing, but was again sentenced to death.

By a 5-2 vote, the Florida Supreme Court affirmed the resentence of death. Dissenting on this issue, you, joined by Justice Kogan, opined that a capital defendant must be permitted to offer at the penalty phase so-called "lingering doubt evidence" -- that is, evidence that the defendant might not actually be guilty of the crime of which he has just been convicted beyond a reasonable doubt.

2. If the defendant has been found guilty beyond a reasonable doubt, it follows that any evidence suggestive of his innocence either has already been rejected by the jury and the judge as not credible or would give rise, at most, only to unreasonable or whimsical doubts. Why should evidence that does not give rise to even a reasonable doubt of guilt and that is not otherwise relevant in any respect be

required to be admitted in the sentencing phase as evidence of possible innocence?

LeCroy v. State, 533 So.2d 750 (Fla. 1988)

By a vote of six to one, the Florida Supreme Court affirmed a death sentence for two brutal first-degree murders by LeCroy, who was 17 years and ten months when he committed the murders. The court noted, among other things, that the sentencing judge gave great weight to LeCroy's youth but found him mentally and emotionally mature. It also noted that Florida statutes clearly provided that 17-year-olds charged with capital crimes should be punished as adults. Construing U.S. Supreme Court precedent, it ruled that there was no constitutional bar to the imposition of the death penalty on those who were 17 at the time of the capital offense.

In your lone dissent, you stated your belief that both the Eighth Amendment of the federal Constitution and the Florida constitution prohibit imposition of the death penalty on one who was a "child" at the time of the crime. In your words, "the death penalty is totally inappropriate when applied to persons who, because of their youth, have not fully developed the ability to judge or consider the consequences of their behavior." [533 So. 2d, at 758.] You further stated: "I am confident that most reasonable persons would agree that the death penalty cannot be imposed on children below a certain age. . . . In my view, that line should be drawn where the law otherwise distinguishes 'minors' from adults." Id., at 759.

3. Why aren't the existing statutes, both in Florida and in other States, the most reliable barometer of what "most reasonable persons would agree" regarding the death penalty for 17-year-olds?
4. As the majority emphasizes, the trial court found that LeCroy's ability to judge the consequences of his behavior was fully developed. Why should a judge forbid a State from choosing to structure its determination of the maturity of a 17-year-old on an individualistic basis and instead require it to engage in the fiction that the moment a person turns 18, he acquires a maturity that did not previously exist?
5. In some 50 or so death penalty cases, you have provided no explanation -- or at times only a conclusory statement -- when you have refused to join the opinion of the court. Do you see any tension between this practice and the obligation of appellate judges to engage in reasoned decisionmaking and to explain that reasoning?

I want to ask you about a 2 to 1 decision you wrote in 1984 while on the district court of appeals in Florida. In State v. Bivona [460 So. 2d 469 (Fla. DCA 1984)], Bivona was arrested for committing a crime in California in June 1983. The State of Florida had also charged him with a previous bank robbery in Florida. At Florida's request, California held him in jail pending extradition to Florida, which occurred in August 1983. In January 1984, Bivona filed a motion asserting that Florida had failed to bring him to trial within 180 days as required under Florida law. Bivona's motion counted from the time he was first arrested in California, not from the time he was returned to Florida.

In your court, the state relied on a Florida law that read:

"A person who is . . . incarcerated in a jail or correctional institution outside the jurisdiction of this State, or who is charged by indictment or information issued or filed under the laws of this state, is not entitled to the benefit of [the 180-day time period] until that person returns or is returned to the jurisdiction of the court within which the Florida charge is pending and until written notice of this fact is filed with the court and served upon the prosecutor." [Rule 3.191(b)(1)]

Despite this unambiguous language, your 2 to 1 opinion for the District Court of Appeals ruled that the charges against Bivona had to be dismissed. Noting that Bivona had cooperated in being extradited, you stated that the law I just read "must be interpreted to apply [only] when a defendant is incarcerated in jails outside the jurisdiction of this state on charges pending in the other state."

The Florida Supreme court unanimously reversed. It found the language of the law to be "without ambiguity" and criticized you for "put[ting] a gloss on it, unwarranted by anything that appears in [it]."

6. How does your opinion in this case comport with your obligation to apply the letter of the law where the language of the law is unambiguous?

Responses of Rosemary Barkett
to Written Questions posed by Senator Hatch
February 8, 1994

Question 1 of Senator Hatch re. Porter v. State, 564 So. 2d 1060 (Fla. 1990):

Since the relationship between Porter and Williams had ended months before and since they no longer shared the same home, I am puzzled by your description of the murder as arising from "a lovers' quarrel or domestic dispute." When in your view can ex-lovers be held fully accountable for violence that they inflict on one another?

Answer:

My dissent in Porter was based on many Florida precedents where, under similar circumstances, the death sentence was not allowed to stand. Accordingly, Porter's sentence was disproportional under case law. The portion of the dissent upon which your question is directed did not suggest that a murderer cannot be held accountable if the murder arises out of a lover's quarrel or domestic dispute. Rather, that portion of the dissent focused on the Court's historic recognition that a murder committed while under the influence of "inflamed passion" and "intense emotions" gives rise to "substantial mitigation" of the death sentence. The dissenting opinion fully documented that historic fact with numerous case citations. Moreover, the dissent also focused upon another well-settled mitigating factor present in this case, Porter's drunkenness just before the murder. The dissenting opinion concluded that these two factors combined to make the death penalty disproportional punishment when compared to other cases.

Please note that in Duncan v. State, 619 So. 2d 279 (Fla. 1993), I voted to affirm the death sentence of a defendant who murdered his fiance after he and the victim had argued. The facts in that case were different from those in Porter and compelled a different result based on the arguments presented. (Incidentally, Duncan was a 5-2 decision in which I joined the majority in affirming the death penalty. Two dissenting Justices said Duncan should have been given a new sentencing proceeding.)

Ultimately, the final judgment depends on the facts and arguments presented in each case, and the balance of aggravating and mitigating circumstances, which is required by the United States Supreme Court. As I said at the hearing, I judge each case on its merits.

Question 2 of Senator Hatch re. King v. State, 514 So. 2d 354 (Fla. 1987):

If the defendant had been found guilty beyond a reasonable doubt, it follows that any evidence suggestive of his innocence either has already been rejected by the jury and the judge as not credible or would give rise, at most, only to unreasonable or whimsical doubts. Why should evidence that does not give rise to even a reasonable doubt of guilt and that is not otherwise relevant in any respect be required to be admitted in the sentencing phase as evidence of possible innocence?

Answer:

Prior to writing my dissent, the United States Supreme Court had never squarely addressed this question. I relied upon the principle of Lockett v. Ohio, 438 U.S. 536 (1978) and the Eleventh Circuit's decision in Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984), cert. denied, 470 U.S. 1087

(1985), which held that a trial counsel's failure to introduce lingering doubt evidence may constitute ineffective assistance of counsel.

Subsequent to my opinion in King and the Eleventh Circuit's decision in Smith, the United States Supreme Court decided Franklin v. Lynaugh, 487 U.S. 164 (1988) (plurality), which held that a prisoner did not have an Eighth Amendment right to have a jury instructed that it could consider residual doubts about guilt as mitigating circumstances in the penalty phase of a capital trial. Franklin is now the law of the land, and I have applied it faithfully. For example, in Downs v. State, 572 So. 2d 895 (Fla. 1990), I wrote a majority opinion affirming the death sentence, relying on Franklin and King to reject the prisoner's argument that the jury should have been instructed to consider "residual doubt" about whether the defendant was the triggerman in determining capital punishment. If confirmed as a federal judge, I will continue to follow decisions of the United States Supreme Court.

Question 3 of Senator Hatch re. LeCroy v. State, 533 So. 2d 750 (Fla. 1988):

Why aren't the existing statutes, both in Florida and in other states, the most reliable barometer of what "most reasonable persons would agree" regarding the death penalty for 17-year-olds?

Answer:

Prior to deciding LeCroy, the United States Supreme Court in Thompson v. Oklahoma, 108 S. Ct. 2687 (1988) decided that it was unconstitutional to execute a minor under the age of 16. The Court left open the question of whether it was unconstitutional to execute a minor between the ages of 16 and 18. Because the Court had not squarely addressed the issue of whether a 17-year-old may be executed, I sought the guidance of the closest Supreme Court opinion on point, Thompson. Justice O'Connor's pivotal opinion in that case focused her Eighth Amendment analysis on whether the Legislature had clearly and expressly considered the propriety of executing a minor.

My opinion in LeCroy indicates that pursuant to the Supreme Court's direction in Thompson, I regarded legislative enactments as one reliable barometer of what reasonable persons believe regarding to the death penalty. That is why I looked to the entire body of Florida law to determine how the Legislature has chosen to regard the legal responsibility of minors. As with the Oklahoma statute, there was no express evidence that the Florida Legislature had considered the question. I viewed that fact in conjunction with numerous Florida laws where the Legislature expressly treated 17-year-olds not as mature adults capable of exercising judgment or discretion. Based on the unclear legislation about capital punishment of juveniles, and the clear legislation about the incapacity of juveniles in a multitude of contexts, I concluded that the Legislature had not sufficiently expressed its intent to execute juveniles to satisfy the Eighth Amendment.

Since LeCroy was decided, the United States Supreme Court decided Stanford v. Kentucky, 109 S.Ct. 2969 (1989), which held that the Eight Amendment does not per se prohibit the execution of 16- and 17-year olds. That case set forth the Eighth Amendment analysis that would have been applicable had LeCroy been decided today. If I am confirmed as a federal judge, I shall apply the federal law announced in Stanford and as it develops in future cases.

Question 4 of Senator Hatch re. LeCroy v. State, 533 So. 2d 750 (Fla. 1988):

As the majority emphasizes, the trial court found that LeCroy's ability to judge the consequences of his behavior was fully developed. Why should a judge forbid a State from choosing to structure its determination of the maturity of a 17-year-old on an individualistic basis and instead require it to engage in the fiction that the moment a person turns 18, he acquires a maturity that did not previously exist?

Answer:

As Justice O'Connor noted, every Justice of the Supreme Court acknowledged in Thompson that there is some age below which a juvenile's crime can never be constitutionally punished by death. The Court drew a line at under 16 years of age in Thompson. I sought to gauge the evolving standards of decency in this State to see whether a line should be drawn at 17. Stanford subsequently held that it should not. Stanford and Thompson are now the prevailing federal law. I shall follow those decisions if I am confirmed.

Question 5 of Senator Hatch:

In some 50 or so death penalty cases, you have provided no explanation -- or at times only a conclusory statement -- when you have refused to join the opinion of the court. Do you see any tension between this practice and the obligation of appellate judges to engage in reasoned decisionmaking and to explain that reasoning?

Answer:

I subscribe to the principle that appellate judges should engage in reasoned decisionmaking and explain that reasoning. I believe my record reflects that I do so despite work load requirements much heavier than those of many other state supreme courts. As you can tell by looking at my entire judicial record, I have written full opinions, including dissents, frequently and on a variety of subjects.

Moreover, as I said at the hearing, my dissents are few. I am in the majority of the Florida Supreme Court 91% of the time in cases decided by opinion.

Question 6 of Senator Hatch re. State v. Bivona, 460 So. 2d 469 (Fla. 4th DCA 1984):

How does your opinion in Bivona comport with your obligation to apply the letter of the law where the language of the law is unambiguous?

Answer:

Although the language of the subsection at issue may have been, on its face, unambiguous, it was not consistent with the remainder of the language of the Rule as it was applied. Accordingly, the majority applied the principle of construction requiring language to be harmonized, if possible.

In this case, under the State's reading of Rule 3.191(b)(1), the defendant could have been held in California for an indefinite period of time. This outcome seemed inconsistent with his speedy trial rights under the rest of Rule 3.191. Rule 3.191 provides that a defendant's speedy trial rights commence when a person is taken into "custody" which, under Rule 3.191(a)(4), is when a "person is arrested as a result of the conduct or criminal episode which gave rise to the crime charged." It was un rebutted and unquestioned that Bivona was being held in California

solely as a result of the Florida criminal charges. Bivona did nothing to thwart any efforts to bring him to Florida. Nonetheless, he was confined in California on Florida charges for 34 days. The State construed 3.191(b)(1) in such a manner that it rendered the language of Rule 3.191(a)(4) meaningless because neither Bivona's incarceration nor the length of his incarceration in California would effect his right to a speedy trial.

Reading Rule 3.191 in its entirety, the majority concluded that Rule 3.191(b)(1) should be interpreted to apply when a defendant is incarcerated outside of Florida on charges pending in other states but not when a defendant was incarcerated only on Florida charges. This gave meaning to both subsections (b)(1) and (a)(4) of Rule 3.191 and afforded defendant reasonable speedy trial rights.

As an aside, I would note that while on the Fourth District Court of Appeal, only 4 of the 61 majority opinions I authored were subsequently quashed by the Florida Supreme Court.

SENATOR HATCH

SUPPLEMENTAL WRITTEN QUESTIONS FOR CHIEF JUSTICE BARKETT

1. Is it a correct statement of Florida law that a defendant who has been convicted of first-degree murder faces either the death penalty or so-called life imprisonment? (If not, please explain.)
2. Is it a correct statement of Florida law that anyone sentenced to life imprisonment in Florida is actually eligible to be considered for parole after 25 years? (If not, please explain.)

Responses of Rosemary Barkett
to Senator Hatch's Supplemental Questions
February 8, 1994

Supplemental Question 1 of Senator Hatch:

Is it a correct statement of Florida law that a defendant who has been convicted of first-degree murder faces either the death penalty or so-called life imprisonment? (If not, please explain.)

Answer:

Yes.

Supplemental Question 2 of Senator Hatch:

Is it a correct statement of Florida law that anyone sentenced to life imprisonment in Florida is actually eligible to be considered for parole after 25 years? (If not, please explain.)

Answer:

Yes. Moreover, to the best of my knowledge no prisoner whose death sentence was reduced to life has ever been released from prison on parole since the death sentence was reauthorized after the United States Supreme Court in Furman v. Georgia struck down capital punishment statutes.

QUESTION FROM SENATOR THURMOND

1. Chief Justice Barkett, I would now like to ask you a few questions on Cruse v. State. As I understand from the trial record, Cruse loaded an assault rifle, a shotgun, a pistol, and 180 rounds of ammunition into his car and began driving to a shopping center. On the way, he fired the shotgun at a 14-year-old boy who was playing basketball and then at the boy's parents and brother. At the shopping center, he shot and killed two shoppers who were leaving a grocery store and wounded a third. He then shot at various other customers, killing one and wounding another.

When Cruse heard sirens approaching, he got back in his car and drove across the street to another shopping center. When Officer Ronald Grogan approached in his police care, Cruse turned, inserted a new clip into his rifle, and fired eight times into the car, killing Officer Grogan.

Officer Gerald Johnson then entered the parking lot and exited his car. Cruse shot at Officer Johnson and wounded him in the leg. Cruse then headed into the parking lot, searching for the wounded officer. When he found him, he shot Officer Johnson several more times, killing him. As a rescue team attempted to move Officer Grogan's car out of Cruse's line of fire, Cruse fired several shots at them and told them to "get away from the cop. I want the cop to die."

Cruse then entered a store and began firing at people trying to escape. He killed one more and wounded many others. He then found two women hiding in the women's restroom and held one as a hostage for several hours. In all, Cruse killed six people and wounded 10 others.

Cruse was found guilty of, among other things, six counts of first-degree murder. The jury recommended death on all six counts. The trial court imposed the death penalty for the murders of Officers Grogan and Johnson.

By a vote of 6 to 1, the Florida Supreme Court affirmed the convictions and the death sentences. Chief Justice Barkett, in your lone dissent, you voted to reverse the convictions. In addition, you stated that the death sentence was in any event inappropriate for Cruse.

Let me begin with the second part of your opinion, where you conclude that even if the convictions were to be upheld, the death sentence was in any event not warranted and should be reduced to life. You conclude that the cold-calculated-and-premeditated aggravator was not met. In particular, you concluded that Cruse had the "pretense of moral or legal justification" for his killings because "the evidence shows that Cruse was acting in response to his delusions that people were trying to harm him." But, as the majority pointed out, the consensus of the experts who testified was that Cruse's delusions related to a fear that others were trying to turn him into a homosexual, not to a fear of any physical harm.

Chief Justice Barkett, how do you respond to the suggestion that your argument against the death sentence for Cruse therefore rests on a serious mischaracterization of the evidence?

You also take the position that even apart from what you see as a pretense of moral or legal justification, there was insufficient evidence of heightened premeditation in the murders of the two police officers.

Chief Justice Barkett, with respect to the murder of Officer Grogan, the evidence shows that when Officer Grogan approached in his police care, Cruse turned, inserted a new clip into his rifle, and fired eight times into the car, killing Officer Grogan. In addition, as a rescue team attempted to move Officer Grogan's car out of Cruse's line of fire, Cruse fired several shots at them and told them to "get away from the cop. I want the cop to die." What additional facts would be needed to convince you that Cruse had heightened premeditation?

Chief Justice Barkett, with respect to the murder of Officer

Johnson, the evidence shows that when Officer Johnson entered the parking lot and exited his car, Cruse shot at him and wounded him in the leg. Cruse then headed into the parking lot, searching for the wounded officer. When he found him, he shot Officer Johnson several more times, killing him. Again, what additional facts would be needed to convince you that Cruse had heightened premeditation?

Now, let me ask you a question about your vote to reverse Cruse's convictions. The basis upon which you would have reversed the conviction was the prosecution's alleged failure to make available to Cruse so-called "Brady evidence." Under the U.S. Supreme Court's ruling in Brady v. Maryland, [373 U.S. 83 (1963)], the prosecution must provide the accused, upon the accused's request, material evidence in its possession that is favorable to the accused. As you stated in your opinion, "Evidence is material when `there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'"

You would have ruled that evidence of the names of two mental health experts whom the prosecution had contacted should have been turned over to Cruse, and that the failure to turn over this evidence required reversal of the convictions and remand for a new trial. In your opinion, you reject the majority's opinion that this evidence was merely cumulative. In addition, you state, "I do not believe that the fact that other experts at trial expressed the same opinion [regarding Cruse's mental state] is a pertinent part of the inquiry of whether or not a Brady violation occurred."

Chief Justice Barkett, how do you reconcile your position that it is not pertinent under Brady whether evidence is merely cumulative with your position that evidence is material for purposes of Brady only if there is a reasonable probability that disclosure of the evidence would have led to a different result at trial?

Responses to Written Questions
Posed by Senator Thurmond
February 8, 1994

Question 1 of Senator Thurmond re. Cruse v. State, 588 So. 2d 983 (Fla. 1991):

How do you respond to the suggestion that your argument against the death penalty for Cruse (i.e., finding that Cruse was deluded into believing that people were trying to harm him) rests on a serious mischaracterization of the evidence?

Answer:

The legislature has made clear that in order for the aggravating factor of cold, calculating and premeditated to be found, there must not be evidence of "pretense of moral or legal justification." § 921.141(5)(i). My reading of the facts contained in the record supports my view that Cruse's delusions met the legal definition of a "pretense of moral or legal justification" in his mind, under Florida law. This, of course, does not mean that he was justified in his actions or that his fears were reasonable.

There were also other significant mitigating factors which, under previous case law, dictated that the death penalty was not proportional in this case.

Questions 2 & 3 of Senator Thurmond re. Cruse v. State, 588 So. 2d 983 (Fla. 1991):

With respect to the murders of both officers, you found that there was insufficient evidence of heightened premeditation. What additional facts would be needed to convince you that Cruse had heightened premeditation?

Answer:

As I stated at the hearing, Florida law provides that premeditation alone cannot support the aggravating factor of cold, calculating and premeditated, i.e., every premeditated murder does not automatically qualify someone for the death penalty. To apply this aggravating factor, Florida law calls for proof of a heightened level of premeditation requiring cold and careful deliberation. In this case, there was uncontroverted evidence that Cruse suffered from delusions that provoked a wild and irrational reaction. It is inconsistent to find that Cruse could suffer from this severe mental disturbance and at the same time engage in the cold deliberation required to find the heightened level of premeditation required under well-settled Florida law.

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United States Senate

COMMITTEE ON THE JUDICIARY
 WASHINGTON, DC 20510-6275

April 13, 1994

The Honorable Joseph R. Biden, Jr.
 Chairman, Committee on the Judiciary
 U.S. Senate
 Washington, D.C. 20510

Dear Chairman Biden:

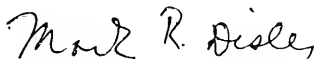
It has just come to my attention that certain editorial material was placed in the record during the February 3, 1994 hearing on the nomination of Rosemary Barkett to be a judge on the United States Court of Appeals for the 11th Circuit. Some of the material falsely characterizes me.

As you know, in October I mailed copies of some of Justice Barkett's opinions, summaries thereof, and cover notes to a small number of journalists.

Some of the editorial critics, it is clear, have either not read, or do not understand, the material they are criticizing. It did not contain, of course, any confidential information, "lies," or "leaks."

I would appreciate it if you would include this letter in the record of the hearing.

Sincerely,



Mark R. Disler
 Minority Staff Director

OGH:mdj

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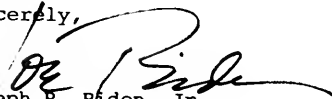
April 15, 1994

Mark Disler
 Minority Staff Director
 Senate Judiciary Committee
 Washington, DC 20510

Dear Mark:

I will certainly include your letter of April 13, 1994, in the record of the Barkett hearing. I know you to be a person of integrity and high ethical standards.

Sincerely,


 Joseph R. Biden, Jr.
 Chairman

October 7, 1994

CONGRESSIONAL RECORD—SENATE

S14791

upon the confirmation of Fred Parker. This is a judge whose career has actually touched both of us.

Fred Parker was a schoolmate of mine at Georgetown Law School. We have known each other for over 30 years. When he came to Vermont, he came as the deputy attorney to then Attorney General James JEFFORDS and served in that function in an exemplary fashion.

It was Senator JEFFORDS who recommended him to be a district judge, with my strong support. He has served the State of Vermont in a fantastic fashion in that regard.

And, even though Senators normally do not get their choices automatically for circuit court of appeals judges, I went to President Clinton and recommended him, saying that even though we were of different parties, we both felt that Vermonters deserve the best.

I join my friend, Jim JEFFORDS, in congratulating Fred Parker on his confirmation at this witching hour of the night.

STATEMENT ON THE NOMINATION OF ROSEMARY BARKETT

Mr. BIDEN Mr. President, during the April 14, 1994, floor debate on the nomination of Rosemary Barkett, some editorial material was placed in the RECORD suggesting that information about the nominee was leaked to journalists by a member of the Republican Judiciary Committee staff. To my knowledge, Republican staff mailed copies of Justice Barkett's opinions and their own summaries thereof. That type of information is not considered confidential information by the committee.

STATEMENT ON THE NOMINATION OF SENATOR ALAN J. DIXON

Mr. NUNN Mr. President, I am pleased to support the nomination of our former colleague Senator Alan Dixon to be the chairman of the Base Closure and Realignment Commission. This Commission has a very important function to perform next year, and I think President Clinton has made an excellent selection in nominating Senator Dixon to the chairman.

The Defense Base Closure and Realignment Act of 1990 set up a process to close and realign military bases in the United States that is fair, objective, nonpartisan, and open to the public. The Defense Department is currently implementing the base closures from the 1986, 1991, and 1993 Base Closure Commissions.

Overall, DOD is closing 70 major bases and realigning 38 others in the United States, as well as implementing over 200 smaller closures and realignments. Once all of these closures and realignments are implemented by the end of this decade, the annual savings to the defense budget will be approximately \$1 billion per year. That is a good record of achievement, but there is much more to be done.

By fiscal year 1999, the defense budget will decline by more than 40 percent in real terms from the mid 1980's, and the size of the military services will drop by almost 30 percent from 1990 levels. At the same time, our domestic base structure has been reduced by only 15 percent in the first three rounds of base closings.

If we are going to maintain the readiness of our Forces, provide for needed modernization, preserve the Bottom-Up Review force levels, and improve the quality of life for our military members and their families under the current budget levels, we are going to have to make further reductions in our base infrastructure.

Back in January of this year, Secretary Perry gave the military departments and overall goal of 15 percent reduction in plant replacement value as the minimum goal for the 1995 base closure and realignment process. If DOD meets this goal, the 1995 base closures and realignments will be much more extensive than any of the three previous rounds—making the job of the next Base Closure and Realignment Commission even more challenging than in the past.

Few people have more experience with all aspects of the base closure process than our former colleague Alan Dixon. As a legislator, Senator Dixon played a key role in the Armed Services Committee in drafting the legislation that set up the current base closure process. As a subcommittee chairman on the Armed Services Committee, he took the lead in the committee's oversight of the 1983 and 1991 base closure rounds. As a Senator from Illinois, he saw first-hand the economic consequences of the base closure process when he worked closely with communities in his State that experienced the closure of a military base.

All of us who worked closely with Senator Dixon on the Armed Services Committee during his tenure in the Senate know that he is a person of great integrity with the leadership ability to deal with difficult issues in an open, even-handed manner. As chairman of the Subcommittee on Military Readiness, Sustainability and Support, Senator Dixon earned the respect of every member of the Armed Services Committee for his expertise on military support and infrastructure issues.

Although this nomination was not received in the Senate until Tuesday of this week, the Armed Services Committee carefully followed all our standard procedures in considering this nomination. Senator Dixon responded in writing to prehearing policy questions on some of the major issues in the area of base closures. These written questions, along with his completed committee questionnaire, will be made a part of the committee's published record of this nomination. The committee has also received and reviewed the standard material from the execu-

tive branch required of all nominees for service on the Commission.

On Wednesday afternoon, the committee held a confirmation hearing with the nominee. At that hearing, Mr. President, Senator Dixon stated his strong commitment to carry out both the letter and the spirit of the base closure statute to conduct the business of the Commission in an open, fair, and objective manner.

As we consider the nomination of the next chairman of the Base Closure and Realignment Commission, I want to recognize the service of the previous chairman, Congressman Jim Cooper chaired both the 1991 and the 1993 Base Closure and Realignment Commissions, and he did an excellent job. His leadership of the Commission and his strong commitment to the integrity of the process established by the Base Closure and Realignment Act of 1990, resulted in the complete endorsement of the 1991 and 1993 Commission recommendations by both the President and the Congress.

Mr. President, the base closure process is a painful but necessary process, and serving as chairman of the Base Closure and Realignment Commission is a thankless but very important job. I appreciate Senator Dixon's willingness to take on a very difficult assignment.

Once confirmed, Senator Dixon will assume the office of chairman of the Base Closure and Realignment Commission and serve through the end of 1995, the statutory termination of the Commission. In order for the Commission to carry out its responsibilities next year, it is important for the chairman to be appointed promptly so that staff can be hired and all of the other necessary preparations can be made.

Mr. President, I hope all of my colleagues will join me in supporting Senator Alan Dixon's nomination to be the chairman of the Base Closure and Realignment Commission.

JUDICIAL NOMINATIONS

Mr. BIDEN Mr. President, I would like to take this opportunity to acknowledge the tremendous effort of the members of my staff who have worked tirelessly to process the nominations of hundreds of judges, U.S. attorneys, U.S. marshals, and other Department of Justice nominees. As of today, the Senate has confirmed district and circuit court nominees this Congress—109 in this year alone. Only once in the last 16 years has the Senate confirmed this number of judges in a single session of Congress. It has been an extraordinary feat.

Reviewing and processing these nominations is one of the most difficult aspects of our work on the committee. It is a job that we all take very seriously and I am proud that my staff approaches the task with diligence and care.

Cathy Poston, chief nominations counsel to the Senate Judiciary Committee, has the unenviable responsibility of ensuring the careful review of

THE MIAMI HERALD, TUESDAY, SEPTEMBER 28, 1993

The Miami Herald

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A boon for the bench

To those who say that it can't be done and feel like quitting: Rosemary Barkett has just one it — again.

The only woman ever to sit on the Florida Supreme Court, she has been nominated to the 11th U.S. Circuit Court of Appeals, one rung below the Supreme Court. What a triumph!

Her Syrian family emigrated from Mexico to Miami when she was 6. At 18 she became a U.S. citizen and a nun. After nine years of teaching, she entered the University of Florida Law School. She became a top-notch trial lawyer in West Palm Beach. Appointed a trial judge in 1979, she moved to the Fourth District Court of Appeal, then to the Supreme Court.

True, some critics don't like her for holding that the Florida Constitution's privacy section protects a woman's right to abortion, or for her opinion declaring unconstitutional the Broward sheriff's random drug searches of interstate bus passengers. Others like her decisions but find her writing murky.

ROSEMARY BARKETT Senate should confirm Florida justice to U.S. court of appeals.

Florida voters looked seriously at Justice Barkett's "liberal" record in 1992. Up for merit retention, she was "targeted" for removal by abortion opponents and conservative organizations, which called her "soft on crime." Justice Barkett, who has voted 200 times to uphold the death penalty, was re-elected easily.

The best measure of a judge is not splendid writing but fair decisions. By that measure, Justice Barkett stands tall on merit and on the full range of her life's experience. That experience, of course, is different from that of her male predecessors on the bench. The judiciary ought to welcome that diversity.

Maybe somewhere in the 11th Circuit there's a "better qualified" nominee. But President Clinton could hardly have found anyone better prepared.

"I'd like to think that I've made a contribution and a difference in terms of protecting the people of this state, and in terms of caring," says Justice Barkett, 54. She has made a difference. More important, she has more to contribute.

THE NEWS-JOURNAL

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"Give me the liberty to know, to utter, and to argue freely according to conscience, above all other liberties."

—Milton

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Fine choice for appeals court

Florida Supreme Court Justice Rosemary Barkett would be an excellent addition to the 11th Circuit Court of Appeals in Atlanta. Her nomination by President Clinton, announced Friday, deserves swift Senate confirmation.

Justice Barkett has been an outstanding jurist. Appointed to the state's high court in 1985 by then Gov. Bob Graham, she became Florida's first female justice. The other members of the state high court voted her the state's first female chief justice in 1992.

The child of immigrants, she was a nun and teacher before becoming a lawyer. Her experiences in overcoming a humble background, her intellect, integrity and scholarship have combined to produce a first-rate judge.

Because Florida's high court judges face an in-or-out merit retention vote every six years, Justice Barkett was on the ballot in 1992. She faced a negative campaign from groups which distorted her record and tried unsuccessfully to paint her as an out-of-control left-wing judicial activist.

EDITORIALS SEP. 28, 1993

Most of these complaints came from a few activists who want to outlaw abortion in Florida and nullify the state's privacy amendment.

The labels these groups peddled during the campaign were nonsense, and the voters rejected them. Justice Barkett stayed on the bench by a 2-1 margin.

THE SAME TALENTS Justice Barkett brought to the Florida courts would serve the country well, particularly on the Circuit Court of Appeals. This is the court which has the final say in all appeals not heard by the U.S. Supreme Court. Because the high court hears relatively few cases, the federal appellate courts are powerful arbiters of constitutional issues.

A judge on such a court must possess rigor of intellect tempered by broad sympathies for litigants. In this regard, Justice Barkett is an unusually strong candidate.

The Senate should take note and vote to confirm her.

The Orlando Sentinel

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Barkett right for U.S. bench

□ Florida Supreme Court Justice Rosemary Barkett's solid record of fairness makes her a top choice for the federal appeals court.

For eight years, Rosemary Barkett has served Florida with distinction and quiet aplomb — her integrity beyond reproach.

It was no surprise that such a solid record of fairness on the state Supreme Court bench would catch the attention of President Clinton.

Last week, Mr. Clinton nominated Florida's chief justice to serve on the federal appeals court in Atlanta, which hears cases from Florida, Georgia and Alabama.

Ms. Barkett, Florida's first and still only woman on the state Supreme Court, is a top-notch choice for the 11th U.S. Circuit Court of Appeals.

Last year, Floridians expressed their vote of confidence for Ms. Barkett in her merit-retention election, despite a campaign by detractors who tried to make her seem soft on crime. By focusing on a smattering of controversial cases, though, her critics ignored the bulk of Ms. Barkett's rulings.

Chances are good that those critics will try to revive such diversionary tactics.

A look at her state Supreme Court record since 1985 produced an indisputable fact: Ms. Barkett placed solidly in the mainstream, voting with the majority in 91 percent of civil and criminal cases and supporting the death penalty in more than 200 cases.

She is hardly out of step with the law or

on a campaign to wage an activist agenda from the bench, as some of Ms. Barkett's critics charged.

The 54-year-old jurist has shown an uncompromising obligation to uphold Florida's constitution.

Such was the case when her vote decided that the privacy amendment in Florida's constitution protects all the state's citizens, including pregnant minors who want an abortion.

Surely, deciding that case must have been difficult for Ms. Barkett, a former Catholic nun, but the state's constitution did not allow for anything else. It is an issue that should be settled by voters changing Florida's constitution, not by a campaign to smear Ms. Barkett's good name.

U.S. Sen. Bob Graham, who appointed Ms. Barkett to a judgeship when he was governor, calls her "a rigorous legal scholar with an understanding of how the law affects the everyday lives of men and women."

And the lives of children, too. Ms. Barkett serves on an American Bar Association panel that is looking at the unmet needs of children. It's heartening that she plans to continue her work on that panel.

When senators meet Ms. Barkett during confirmation hearings, they will find a committed judge who strives for justice under the law.

Sun-Sentinel

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EDITORIALS

Barkett a high-quality nomination for court, source of pride for S. Fla.

As expected, President Clinton has nominated Rosemary Barkett, chief justice of Florida's Supreme Court, to become a federal appellate judge.

The choice is an excellent one, reflecting well on Clinton's commitment to quality in making appointments. If confirmed, she would join the 11th U.S. Circuit Court of Appeals in Atlanta, which hears cases from Florida, Georgia and Alabama.

Barkett's rise up the legal and judicial ladder has been swift, earned by skill as a trial attorney and judge, leadership as chief judge and chief justice, intelligence as a legal scholar (tops in her law school class), tenacity in problem-solving, plus a commitment to social justice, particularly the needs of the poor.

Her confirmation by the Senate should be swift, despite likely opposition from groups like Florida Right to Life and the National Rifle Association, which mounted a noisy but ineffective campaign in 1992 to defeat her in a merit retention election.

Her critics have claimed, falsely, that she is "soft" on crime and criminals and engages in a pattern of "liberal activism" to free convicted killers, weaken law enforcement and usurp crime victims' rights.

To the contrary, the court almost always upholds death penalty convictions (she has done so 200 times) and avoids engaging in "judge-made law." So-called liberal activism

really involves overturning convictions or sentences based on major trial court errors, protecting people from abusive police and prosecutorial tactics and upholding federal laws and higher court rulings.

An evaluation of Barkett's rulings shows she is not an extremist, going against the grain, but is clearly in the court's mainstream, siding with the majority 91 percent of the time.

Barkett, 54, is a University of Florida Law School graduate who has been on the court since her appointment in 1985 by then-Gov. Bob Graham, who as a senator will vote on her confirmation.

In a sense, she exemplifies one aspect of the American dream — an immigrant who moves to America, learns English and achieves success. Born in Mexico of Syrian parents, she is a former nun and schoolteacher.

South Floridians have particular cause for pride. Raised in Miami, Barkett served as a private attorney in West Palm Beach for nine years before being appointed a Circuit Court judge in 1979. She became Palm Beach County's chief judge in 1983 and joined the 4th District Court of Appeal in West Palm Beach in 1984, moving to the Supreme Court a year later. In July 1992, she was named Florida's first female chief justice.

Barkett is also living proof of why Florida's "merit selection" appointment process does a far better job than elections in putting high-quality people on the bench.

October 2, 1993

Clinton wise to choose Barkett

President Clinton made a wise and courageous choice in nominating Florida Supreme Court Chief Justice Rosemary Barkett to fill a seat on the 11th Circuit Court of Appeals in Atlanta.

Wise because Barkett, a former nun and schoolteacher, would bring a lifelong commitment to fairness and justice unsurpassed on the appellate court responsible for hearing cases from Florida, Georgia and Alabama.

Courageous because despite Barkett's long record of upholding the law while defending the rights of all people, her critics will be out of force when the U.S. Senate confirmation hearings begin.

Her detractors will be quick to falsely portray Barkett as soft on crime, careless of the rights of children and promoting a liberal agenda.

Senators, including Florida's own Connie Mack, will do well to dispense with the rhetoric and, instead, take a hard look at Barkett's record.

The senators will find that while she has refused to accept the death penalty carte blanche, she has voted to uphold it more than 100 times. She is one of the state's strongest and most outspoken defenders of children's rights. Of the more than 3,000 cases in which she and the other justices have rendered opinions based on a vote of the court, she has voted with the majority in 91 percent of the cases. That scarcely indicates she is guided by her own personal agenda or is out of the mainstream.

Of the 19 specific cases used to attack her record during the 1992 retention election, sev-

en were unanimous decisions by the court. The 270 cases cited as evidence that she somehow favors criminals were chosen from among 3,000 decisions because they supported the critics' points; her supporters could easily select 270 that would have refuted them.

Fortunately, voters saw through the smoke and returned her to the bench with more than 60 percent of the vote.

A 1970 honors graduate of the University of Florida Law School, Barkett has experience with the law that includes nine years as a lawyer in West Palm Beach, six years as a circuit and state appellate judge and eight years as a member of the state Supreme Court, the last year as chief justice. She has consistently spoken out for public participation in and inspection of fiscal and managerial matters of the government and courts. But she also recognizes the need to shield some judicial files, including psychological evaluations of children and private papers filed in divorce disputes.

"She is everything you want in a judge," said Florida Attorney General Bob Butterworth. "Someone who listens thoroughly to a case, researches both sides fully and renders a decision which is in accordance with the law."

Off the bench, Barkett, 54, has touched many lives on the lecture circuit and served admirably as chairwoman of the Study Commission on Child Welfare, which helped lead to the ongoing overhaul of the state Department of Health and Rehabilitative Services (HRS).

Overall, Barkett's reputation — as dynamic, thoughtful, intelligent and personable — makes her amply suited to serve on the federal bench.

The Senate should move swiftly to confirm her appointment.

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The right targets Barkett again

Sen. Orrin Hatch has announced that he is applying a litmus test to appointees to the federal bench. They must be in favor of the death penalty to get his support.

He has back-pedaled a little, saying there may be a few special cases when he might make exceptions. Nevertheless, the thrust of his policy is clear. It's also clear which nominees are going to be grilled on the issue. One of them is Florida's Rosemary Barkett.

Justice Barkett's nomination to the 11th Circuit Court of Appeals is being opposed by the same single-interest groups that unsuccessfully opposed her retention on the Florida Supreme Court. During her merit retention election last year, she was unfairly attacked both by anti-abortion zealots and the National Rifle Association. They tried to paint her as an ultraliberal who is soft on crime.

Yet in the more than 3,000 Florida Supreme Court decisions in which she participated she voted with the majority 91 percent of the time. If she's far out of the judicial mainstream, then so is the whole state Supreme Court. An absurd notion on its face.

As for the death penalty, she voted to uphold more than 200 death sentences in

EDITORIALS OCT 18 1993

Florida. It's unclear here what more her opponents want. More enthusiasm for executions? For her to rubber stamp all death sentences in Florida? How much blood is Sen. Hatch demanding of nominees?

THE LABELS peddled during the merit retention campaign were nonsense and Florida voters sensibly rejected them. Justice Barkett stayed on the bench by a 2-1 vote margin.

The right-wing special interest groups, however, are counting on the U.S. Senate to be more easily swayed than the voters of Florida. We hope they are wrong.

Justice Barkett has been an outstanding jurist. The child of immigrants, she was a nun and teacher before becoming a lawyer. Her experiences in overcoming a humble background, her intellect, integrity and scholarship have combined to produce a first-rate justice.

It would be a tragedy if a noisy group of extremists manages to paint her in false light. Justice Barkett is an unusually strong candidate. The Senate should take note and approve her nomination.

St. Petersburg Times
October 19, 1993

Right wing is recycling old garbage



■ Philip Gailey

The *Wall Street Journal* editorial page and the Free Congress Foundation — the hard-right team that seeded the political controversy that engulfed Lani Guinier's nomination to a top Justice Department post — have discovered another threat to the republic. This time it is Florida Supreme Court Justice Rosemary Barkett, who is President Clinton's nominee to a seat on the 11th U.S. Circuit Court of Appeals.

To hear the rap sheet they have compiled on Barkett, you'd think she is personally responsible for most of the crime and mayhem in Florida, that she is aggressively pro-criminal and anti-police, and that she spends most of her waking hours looking for technicalities to spare brutal killers from the hot seat.

In his *Wall Street Journal* column last Friday, Paul Gigot wrote that "to wade through Ms. Barkett's opinions is to encounter root causes, 'unconscious discrimination,' fear of police and other liberal explanations for crime. This is especially true in death penalty cases, which she attempts to overturn on the smallest technicality."

Gigot and his friends on the right are recycling the same garbage that anti-abortion forces, the National Rifle Association and some state prosecutors threw at her in last year's retention election. The smell is even fouler this time around. They're using the same distortions, oversimplifications and untruths that her Florida opponents used in their smear campaign.

The state's voters sorted through the garbage and affirmed Barkett, the first woman to serve on Florida's high court, for another term. She won 61 percent of the vote. Remember, Florida's conservative voters stuck with George Bush last year, and they overwhelmingly support the death penalty.

Sen. Orrin Hatch of Utah, a conservative Republican on the Senate Judiciary Committee, plans to lead the inquisition at Barkett's confirmation hearings. If President Clinton is willing to nominate to federal judgeships men and women who personally oppose abortion, you would think Republicans would be willing to accept nominees who have shown they can uphold the death penalty regardless of their personal feelings.

What will it take to convince people like Hatch that Barkett has not attempted to pull the plug on Florida's electric chair?

Barkett was nominated to the Florida Supreme Court by then-Gov. Bob Graham, who signed dozens of death warrants. She has hardly been a disappointment to Graham on that score: Barkett has upheld the death penalty in more than 200 cases since she joined the court.

A study by Steven Gey, a professor of constitutional law at Florida State University, found that Barkett voted with the majority of the court in 88 percent of the criminal cases it decided from 1986 to September 1992. No one would call the Florida Supreme Court a bunch of bleeding heart liberals, and Barkett has often stood with some of the court's most conservative members in her opinions.

Yes, Barkett has voted to overturn death sentences. But what appeals judge hasn't? The criminal justice system makes mistakes. The courts are there to correct them. The thing that really bothers her critics is Barkett's obvious lack of enthusiasm for the death penalty.

Barkett, a former nun, refuses to say what her personal views are. I assume she personally opposes capital punishment but understands a judge must follow the law. Attorney General Janet Reno personally opposes state executions, but as Dade County state attorney she sought the death penalty in plenty of cases. And what about Ruth Bader Ginsburg? The newest member of the U.S. Supreme Court, which has the final word on these matters, was confirmed even though senators still don't know much about her views on capital punishment.

When the Senate Judiciary Committee opens its confirmation hearings on the Barkett nomination, the Florida jurist will be escorted to the witness table by Democratic Sen. Bob Graham. It would be a shame if the state's Republican senator, Connie Mack, doesn't join Graham for the customary introduction of the nominee.

Mack, who voted to confirm Ginsburg, says he won't make up his mind about Barkett until he sees what the hearings produce. That's a cop-out. It is usually Graham, not Mack, who waits until the last minute to take a position on a controversial issue.

Mack, who is facing an easy re-election campaign next year, has grown as a senator in recent years. Even many of his old critics grudgingly acknowledge that much. That's why it's disappointing to see Mack holding back while the hard-right ideologues in Washington circle Barkett for the kill.

For Mack, the choice is simple: He can stand with Florida voters, who stuck with Barkett last year, or he can stand in the slimy swamp with the vipers who poison nearly every issue they touch.

■ Philip Gailey is editor of editorials for the Times. ■

OUR OPINION

Tallahassee
Democrat

10-21-93

Who's right about Barkett?

D.C., NY conservatives, or us?

Conservatives in Washington and New York want to stop Florida Supreme Court Chief Justice Rosemary Barkett from getting a federal judge's job.

Florida Supreme Court Chief Justice Rosemary Barkett is the latest target of social-conservative lobbyists. They are trying to stop Barkett's nomination to the 11th U.S. Circuit Court of Appeals.

The Wall Street Journal takes a dim view of her qualifications. So do anti-abortion groups and conservative lobbyists.

Everyone's entitled to his or her views about Barkett, of course.

But before the Senate votes on Barkett's nomination, senators should keep in mind that Barkett has been re-elected by the people of a conservative state.

Last November, Barkett overcame a determined attack by anti-abortion organizations, supporters of the National Rifle Association and others who were unhappy with some of Barkett's rulings.

In an effort to portray Barkett as a super-liberal justice, these organizations represented her rulings as profoundly out of step with the majority of Floridians.

Barkett's critics charged that she was weak in supporting the death penalty. Actually, Barkett voted to confirm more than 200 death sentences during her time on Florida's Supreme Court.

She did not approve every death sentence, but it's a distortion of her record to suggest that she's an extremist who refuses

to support the death penalty.

However, the biggest flaw in the anti-Barkett argument is the fact that it was rejected by the majority of Floridians. They voted to return Barkett to the Supreme Court, 61 percent to 39 percent. In presidential politics, they have a name for a 22-point victory: landslide.

It's not as though Barkett was re-elected overwhelmingly by a state full of super-liberals. After all, Floridians elected GOP Gov. Bob Martinez in 1986, voted twice for Ronald Reagan and gave the state's support to George Bush in 1988 and 1992.

Now Republican U.S. Sen. Connie Mack says he'll have to review Barkett's record before deciding whether to back her nomination.

Mack is to be commended for reviewing a federal judicial nominee's qualifications; after all, this is a lifetime appointment. The decision should be made carefully.

But Mack also should consider carefully whether to value the opinions of Washington conservative activists more highly than the opinions of his constituents.

Who does Connie Mack work for? The Wall Street Journal? Or the people of the state of Florida?

The people of Florida have spoken about Rosemary Barkett: They think she's a good judge.

CALL WASHINGTON

If you'd like to let your senators know what you think about Rosemary Barkett's nomination (the House is not involved), here are their phone numbers and addresses:

SEN. BOB GRAHAM, 524 Hart Senate Office Building, Washington, D.C. 20510, (202) 224-3041.

SEN. CONNIE MACK, 517 Hart Senate Office Building, Washington, D.C. 20510, (202) 224-5274.



Barkett

Fort Lauderdale Sun-Sentinel
October 21, 1993

Mack should join pro-Barkett ranks

Florida's Republican U.S. senator, Connio Mack, is officially "undecided" about whether to support or oppose Rosemary Barkett's nomination to join the 11th U.S. Circuit Court of Appeals in Atlanta.

There's no reason whatsoever for Mack to remain on the fence. Mack should promptly join Democrat Bob Graham in supporting her, as he did for Attorney General Janet Reno, and refuse to join other conservatives opposing her.

Barkett, the Florida Supreme Court's chief justice, is just the kind of judge conservatives like Mack should support.

She doesn't believe in "judge-made" law. She believes issues should be decided on their merits, not ideology. She believes a judge should put personal feelings aside in deciding whether a law is constitutional or whether to uphold a lower court ruling.

In one way, Barkett is lucky: She survived a full-fledged assault in 1992 from political enemies. She won 61 percent of

votes in a "merit retention" election despite a campaign of disinformation.

Her critics have claimed, falsely, that she is "soft" on criminals, a death penalty foe and engages in a pattern of "liberal activism" to free convicted killers, weaken law enforcement and usurp crime victims' rights.

Actually, an analysis of her court opinions shows she and other Florida Supreme Court justices usually uphold death penalties. She has voted to do so more than 200 times. When she voted to overturn convictions or sentences, she did so to correct major trial court errors, protect people from abusive police and prosecutorial tactics and uphold federal laws and higher court rulings. She has voted with the Supreme Court majority 91 percent of the time.

Barkett's nomination deserves swift approval. She will make an excellent addition to the federal bench.

The court seat has been vacant for four full years. The Senate Judiciary Committee should expedite her hearing.

Sarasota Herald-Tribune
October 22, 1993

EDITORIALS

Justice Barkett's record

President Clinton has nominated Rosemary Barkett to sit on the 11th U.S. Circuit Court of Appeals. Justice Barkett is the first woman ever to serve on the Florida Supreme Court or to serve as its chief justice.

When Justice Barkett's confirmation hearings begin before the Senate Judiciary Committee, she will be introduced and sponsored by Florida's senior senator, Bob Graham.

Florida's junior senator, Connie Mack, according to a report in the *Herald-Tribune* on Wednesday, says he does not know at this time whether he will support or oppose her nomination. He wants to wait to see what comes out in the hearings. That's not good enough, senator: If you don't by now have a firm opinion about the qualifications of Justice Barkett, you have not been paying attention to what has been happening in Florida.

It was less than a year ago that Justice Barkett received a more-than-60-percent vote of approval in a merit-retention election, despite a vicious campaign against her orchestrated by the same fringe groups from the loony right which are trying now to discredit her.

Fortunately, her qualifications will be submitted to a Senate committee which has the resources and the time to examine the record carefully and to

ask questions both of Justice Barkett and her detractors, who complain that she is soft on crime, or, in the words of the *Wall Street Journal*, "She's no hanging judge."

And, indeed, she is no hanging judge inasmuch as no criminals have been sentenced to hang in Florida since she has been on the bench. But she has voted in more than 200 cases to uphold the death penalty. In her merit-retention election last year, she had the support of the statewide Police Benevolent Association and the Fraternal Order of Police, as well as Janet Reno, then state attorney for Dade County, and Harry Shorstein of Duval, one of the toughest prosecutors in the state.

Since Justice Barkett has been on the state Supreme Court, the court has handed down more than 12,000 decisions. More than 9,000 of them were disposed of without written opinions. More than 3,100 of them came with written opinions, so it can be determined how each justice voted. Justice Barkett voted with the majority of the court in 91 percent of the cases. She voted with the majority in 88 percent of the decisions in criminal cases.

On the record, she is very much in the judicial mainstream. Testimony and evidence at the forthcoming hearings will convince the Senate Judiciary Committee of that truth. Floridians have already delivered their opinion.

EDITORIALS

A woman of conviction

*Gainesville
Tex
10-23-93*

The right wing is going after Rosemary Barkett — again.

Last year, a coalition of conservative groups — from the National Rifle Association to the anti-abortion crowd — set out to deny Barkett another term on the Florida Supreme Court.

Barkett is the first woman to serve on Florida's high court. Coincidentally — or perhaps not so coincidentally — that coalition included some of the same groups and individuals who had previously tried to unseat the first black and the first Jew to serve on the court.

Barkett deserves approval

They called Barkett soft on crime, despite the fact that she voted with the majority of Florida's decidedly conservative Supreme Court 88 percent of the time. They called her anti-death penalty despite evi-

dence that Barkett — a former nun — had voted to confirm the death penalty 200 times.

Their ravings and distorted accusations didn't work. Last fall, the Florida voters opted by a 61 percent margin to retain Barkett.

Frankly, we would be content to see Justice Barkett remain on the Florida Supreme Court for many years to come. She is a thoughtful and insightful jurist who doesn't mind standing up for the constitutional rights of individual Floridians even at the expense of being labeled "pro-crime" by ideological lynch mobs.

But President Bill Clinton has nominated Barkett to fill a vacancy on the 11th U.S. Circuit Court of Appeals, which hears federal cases from Florida, Georgia and Alabama. Her addition to the federal bench would provide welcome balance after 12 years of court-packing by a Reagan-Bush administration that made opposition to abortion the No. 1 litmus test for its nominees.

But guess what? The conservatives have their knives out at Barkett once again. Republican U.S. Sen. Orrin Hatch, R-Utah, and a group called the Free Congress Foundation are agitating against Barkett's nomination on the grounds that she's not bullish enough on the death penalty.

To his credit, Florida's junior U.S. Sen. Connie Mack, a Republican, has not joined the anti-Barkett witch hunt. It is less to his credit, however, that Mack hasn't endorsed Barkett either. Frankly, her record on the Supreme Court makes her more than worthy of Mack's support.

It is worth noting that the Free Congress Foundation is also out gunning for another female Clinton judicial nominee, and ostensibly for the same reason. Martha Craig Daughtrey, the only

woman member of the Tennessee Supreme Court, has also been tapped for a federal court position.

Last week, the Free Congress Foundation said Daughtrey never voted to affirm a death sentence while on the Supreme Court. At the same time, however, a report out of Tennessee showed that she affirmed death sentences on numerous occasions while serving on a state court of appeals, and has done so at least once as a Supreme Court justice.

There's little question that the conservative campaign against Barkett and Daughtrey is really just an attempt to paint Bill Clinton as soft on crime, and particularly soft on the death penalty.

But that's another red herring. As governor of Arkansas, Clinton was bullish on the death penalty. In a nice piece of timing, Gov. Clinton even managed to dispatch one Arkansas death-row inmate to the hereafter during his presidential campaign.

This week, Justice Barkett may have handed Hatch and the Free Congress Foundation a little more ammunition to use against her. She was on the dissenting end of a 4-3 vote to approve a new Florida Supreme Court policy which will cut from two years to one year the time that state prisoners have to appeal a death sentence.

The policy was prompted by a threat from the Florida Legislature to cut funding for lawyers who represent death-row inmates unless the appeals time was shortened. Barkett left no doubt that she considered the threat a form of blackmail.

"It should be self-evident that it is a dangerous precedent to attempt to coerce the court into passing a rule in exchange for the legislature to meet an existing responsibility," Barkett wrote in a dissenting opinion.

Another dissenter, Justice Gerald Kogan, was blunter still: "We should never let a constitutional right be diminished for the sake of money," he wrote.

No doubt, Barkett's detractors will latch upon this latest event as further proof that she is "soft" on the death penalty. And in truth, if she wanted to quiet her critics and help secure her nomination, Barkett could easily have gone along with the majority.

That she did not simply demonstrates that Barkett is a woman of firm convictions, convictions that will not waiver for political expediency.

No wonder she is under attack in Washington, a city that seemingly runs on the currency of political expediency.

October 24, 1993

The Palm Beach Post

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Do justice to Barkett by ignoring her critics

Rosemary Barkett has heard the baying hounds at the head of the right-wing hounding party for nearly three years. After Florida's anti-abortion groups failed to dislodge Leander Shaw from the Florida Supreme Court in November 1990, they made Justice Barkett their next target. The state's first female chief justice outran the dogs in 1992, when voters easily gave her another six-year term.

The howls started again when President Clinton nominated Justice Barkett for a seat on the 11th U.S. Circuit Court of Appeals, one step below the U.S. Supreme Court. "Yikes!" cried the rigidly conservative *Wall Street Journal* and *Washington Times*. A *Journal* column was headlined, "Crime choice: she's no hanging judge." Justice Barkett wouldn't do. Too liberal. Too soft on crime because, gasp, she doesn't embrace the death penalty. U.S. Sen. Orrin Hatch, R-Utah, ranking Republican on the Judiciary Committee that must question Justice Barkett, said he wasn't sure she would do.

How easily principle is tossed aside in Washington. During Clarence Thomas' Supreme Court confirmation hearings two years ago — before Anita Hill — Sen. Hatch got fed up with questions about abortion. He said it wasn't appropriate to know a judge's position.

But all right. Let's be honest about it. Rosemary Barkett is a liberal judge. Not "the most liberal," as an anti-abortion detractor called her. That would be Justice Gerald Kogan. And not wildly liberal, any more than Major Harding, one of her colleagues, is wildly conservative. Justice Barkett is personally opposed to the death penalty, but she follows the law when she rules on it, having upheld death penalty convictions more than 200 times.

She's made some bad decisions, such as prohibiting juvenile courts from finding kids in contempt and making search rules a little hard for police. But her critics want to kill her nomination by pulling out one case and drawing a profile from it. For the conservative commentators, that's Cleo McCoy, who killed a couple near Belle Glade when he was two months shy of his 18th

**Florida's high court
chief is liberal. She's
also qualified to be a
federal appellate judge.**

birthday. When his murder conviction was upheld by the state Supreme Court, Justice Barkett was the only dissenter. "I believe the death penalty is totally inappropriate," she wrote, "when applied to persons who, because of their youth, have not fully developed the ability to judge or consider the consequences of their behavior."

Cleo McCoy was no wayward kid, but the constitutional question of executing a minor was also being asked of the U.S. Supreme Court. So her comment wasn't extreme. And in 1989, when the high court freed on a technicality a man convicted of raping a disabled 13-year-old girl, there was also one dissenter: Rosemary Barkett.

Conservatives can't expect Bill Clinton to name only conservative judges, any more than liberals could have asked George Bush to pick only American Civil Liberties Union honorees (such as Justice Barkett). Good courts need both. Nominees should be rejected only if they have dangerously extreme views or character problems. Justice Barkett has neither.

Her sponsor is Florida's Democratic senator, Bob Graham. As governor 14 years ago, he made Justice Barkett a judge in Palm Beach County. Nine years ago, he made her a state appellate judge. Eight years ago, he made her the first woman on the Florida Supreme Court. Ideally, Florida's Republican senator, Connie Mack, can put aside any bad feelings over Sen. Graham's opposition to Kenneth Ryskamp's nomination as a federal appellate judge and do what he has done so often — find a way to work with Sen. Graham. Then hearings can be scheduled and Justice Barkett can be confirmed.

The hounds will always yelp. But the hunters don't have to succumb.

The Orlando Sentinel
October 25, 1993

Barkett in the mainstream

□ Florida Chief Justice Rosemary Barkett, tapped to be a federal appeals judge, is hardly soft on crime, as her opponents say.

Conservatives on Capitol Hill have started to question whether Chief Justice Rosemary Barkett of the Florida Supreme Court is too soft on crime to be a federal appeals judge.

Nothing new there.

President Clinton's choice for the 11th U.S. Circuit Court of Appeals already fought that war last year during her retention election to Florida's top court. Armed with the facts, she won over Floridians with 61 percent of the vote.

Last year, Ms. Barkett's detractors — from the National Rifle Association to abortion-rights opponents — used a few high-profile cases in which Ms. Barkett sided with the minority to try to paint her as out of step with Florida's judiciary.

A review of Ms. Barkett's record from 1985, when she was appointed to the Supreme Court, to September 1992, however, shows the jurist to be solidly in the mainstream. She voted with the majority in 91 percent of all cases before the court, and in 88 percent of the criminal cases.

That apparently isn't enough for Utah Republican Sen. Orrin Hatch or the Free Congress Foundation, an ultra-conservative judicial watchdog group. Both Mr. Hatch and the foundation are questioning Ms. Barkett's commitment to uphold the death penalty.

Certainly, Ms. Barkett has been cautious about applying the death penalty in certain instances. Taking into account that there is no turning back on such a decision, however, that caution is warranted.

Consider that a study released Thursday by Death Penalty Information Center, a group that opposes capital punishment, documents the cases of 48 men who were released from death row in their states during the past 20 years when new evidence emerged to prove their innocence.

The report concludes that, in those cases, perjured testimony or improper conduct of prosecutors led to guilty verdicts. It points out several cases in which coincidence, rather than courtroom procedure, produced evidence of an inmate's innocence.

As it stands, Ms. Barkett voted to uphold the death penalty 200 times when the issue came before the Florida Supreme Court in the past eight years she has been on the bench.

Not only that, but of seven cases in which the U.S. Supreme Court decided to overturn Florida death sentences while George Bush was president, Ms. Barkett had voted to execute in four.

That would seem to make Ms. Barkett much tougher than the U.S. Supreme Court majority appointed by two Republican presidents in the past decade.

Clearly, drawing conclusions from a few cases about Ms. Barkett's integrity and her commitment to the law is reckless and unfair. Let the Senate judge Ms. Barkett based on her overall record.

Senators are sure to find Ms. Barkett's caution to be well-reasoned and in the best interests of fairness and justice for all Americans.

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10/26/93

Standing on principle

They just won't leave Rosemary Barkett alone.

"They" are the conservative wing of the Republican Party and others who seem to regard her as a flaming liberal in the Earl Warren tradition. Last year, they tried to torpedo Barkett's retention on the Florida Supreme Court by mounting a misleading campaign about her record.

Florida Justice Barkett's opponents are back again

The coalition called Barkett soft on crime, despite the fact that she voted with the majority of the state's highest court 88 percent of the time. They even tried to paint her as judicially opposed to the death penalty, even

though she voted to affirm some 200 death sentences.

The effort didn't work. Last November, Florida voters opted to retain Barkett — who is now the chief justice — by a vote of 61 percent.

Barkett would be a valuable member of the state Supreme Court for many years to come. She is a thoughtful and insightful jurist who isn't afraid to stand up for the constitutional rights of individuals even at the risk of being labeled pro-crime by ideological lynch mobs.

But President Clinton has nominated Barkett to fill a vacancy on the U.S. 11th Circuit Court of Appeals, which hears federal cases from Florida, Georgia and Alabama. Her addition to the federal bench would provide welcome balance after 12 years of court-packing by two Republican administrations that made opposition to abortion a prerequisite for its nominees. Barkett has voted to uphold abortion rights under a privacy provision of the Florida state Constitution.

The opponents are back, this time trying to scare up opposition in Washington. Sen. Orrin Hatch, R-Utah, and an organization called the Free Congress Foundation are questioning Barkett's nomination because she may be deemed insufficiently enthusiastic about capital punishment.

Florida's U.S. senator, Connie Mack, finds himself in a tight spot on this nomination, which has been strongly supported by his Democratic colleague from Florida, Bob Graham. Mack has neither endorsed nor opposed Barkett's nomination, saying he hasn't made up his mind. Mack is a predictable conservative on many issues, but he has

established himself as a strong defender of free speech.

The Free Congress Foundation also is gunning for another Clinton appeals court nominee, Tennessee Supreme Court Justice Martha Craig Daughtrey, also on grounds of being less than wholeheartedly supportive of capital punishment.

The campaigns against Barkett and Daughtrey appear, at this point, to be pro forma — an attempt to portray Clinton as soft on crime and on the death penalty. (This is especially ludicrous since Clinton supports capital punishment and even signed a death warrant in Arkansas during the 1992 presidential campaign.) Unless additional derogatory information surfaces, both nominees seem likely to be approved by a Judiciary Committee still trying to recover from the Clarence Thomas-Anita Hill hearings.

Last week, however, Barkett may have provided her opponents a little more ammunition. She was a dissenter in the 4-3 decision which cuts from two years to one the time that state prisoners have to appeal a death sentence after their initial conviction and sentence has been upheld by the Supreme Court.

The ruling was prompted by a carrot-and-stick offer from the Florida Legislature to provide more funding for lawyers to represent death-row inmates if the appeals timetable could be shortened. The funding would be reduced if the time wasn't shortened. Barkett said she considered the offer a form of blackmail.

"It should be self-evident that it is a dangerous precedent to attempt to coerce the court into passing a rule in exchange for the Legislature to meet an existing responsibility," she wrote in a dissenting opinion.

Justice Gerald Kogan was even more blunt in a separate dissent: "We should never let a constitutional right be diminished for the sake of money."

Barkett's detractors no doubt will seize upon her dissent in this case as further evidence that she is "soft" on the death penalty. If she had wanted to avoid controversy, she easily could have gone along with the majority, or dissented without writing an opinion. That she did not demonstrates that she is unwilling to bend her principles for personal advantage.

No wonder she's under attack in Washington, where standing on principle is such a rarity.

G-2 The Orlando Sentinel, Sunday, October 31, 1983

The Orlando Sentinel

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Cheap-shot artists waste taxpayer dollars to take aim at Barkett

To use mild language, I don't have much use for the U.S. Senate Judiciary Committee. In recent years, it has allowed the confirmation process for federal judges to become a show-and-tell circus in which the most radical and extreme interest groups play a bigger role than the senators themselves.

That is wrong. It doesn't matter which nominee is being chaired or measured or which party is in the White House. If we have a vested interest in the integrity of our federal judicial system, we have a vested interest in those processes not becoming so distorted and destructive of people's reputations that no decent person would even accept a presidential nomination.

Finally, we as citizens have a vested interest in our governmental processes always being fair and just.

For all those reasons, I was ticked off — I'm really ticked off — in the large package in the Senate Judiciary Committee. It was addressed to me in care of my syndicate and was unsolicited.

In it were a couple of memoranda from some pub-

President Clinton to be a federal appeals court judge in the 11th Circuit.

The packages contain a number of cases in which she has written dissents, as well as a so-called analysis of them. He urges me to feel free to use them, though they are not for attribution. Disler has been in Washington too long. I don't let some staff turkey I never laid eyes on send me an unsolicited package of information, all acquired and paid for at the taxpayer's expense, and then be told they are not for attribution. The public has a right to know how their public servant, in this case Mr. Mark R. Disler, is wasting their money.

If you see some other pundit pontificating about Justice Barkett, if he or she accuses me of being about as dumb as a brick, or as stupid as Little Mr. Lasker on the minority staff of the Judiciary Committee.

In the second memo, while repeating that his memoranda are not for attribution, he adds, "Please do not feel free to use them." Thanks. You can contact Ed Whelan of my staff at the above number if you have questions.

I don't know what the official duties of the Repub-

lican Staff Director of the U.S. Senate Judiciary Committee are, but they surely do include including a disclaimer in the introduction of a nominee's record to inform the public. The so-called analysis of the cases he includes are inept distortions. They are wrong characterizations, not analyses. Some are so far off the mark one wonders if the writer can even comprehend the English language.

The drift of this poisonous partisan, so-called analysis is that Justice Barkett is soft on crime. In one such bit of garbage, it says, "Barkett views herself as one of the enlightened elite who must override democratically enacted laws in order to bring about what the riff-raff would really want." That's damned lie.

Listen, I happen to know this lady Justice. She is not soft on crime. She has one of the finest legal minds in the country, a terrific set of moral values, and an abiding respect for the U.S. Constitution and the principles of liberty and law. Thomas Jefferson, James Madison and Patrick Henry would definitely respect her intellectual integrity. Disler who abuses current Supreme Court precedents like Disler who abuses their positions and the taxpayers.



Charley Reese

OF THE SENTINEL STAFF

lic servant named Mark R. Disler, who identifies himself as Republican Staff Director, Senate Judiciary Committee. The two memos are addressed to "Interested parties" and to "Interested persons." One dated Oct. 3, states: "Re: Nomination of Great Interest." The second, dated Oct. 12, states: "Re: Rosemary Barkett."

They are both about Florida Supreme Court Justice Rosemary Barkett, who has been nominated by

While Senator Deliberated, a Top Aide Politicked

By NEIL A. LEWIS

WASHINGTON, Nov. 4 — At the same time that Senator Orrin G. Hatch had been saying publicly that he had not made up his mind about a Clinton administration judicial nominee, one of his top aides began distributing damaging material about her which supporters characterized as a smear campaign.

Senator Hatch said in an interview yesterday that he had been unaware that the senator aide was sending out the materials urging the journalists to stir up a campaign against the nominee, Rosemary Barkett, the chief justice of

Florida Supreme Court. Mr. Hatch described the action as improper way to deal with the nomination and said he intended to appoint Justice Barlett. "I never would have seen the connection the sending out of such materials," he said. The Senator said he had disciplined the aide, Mark R. Butler, the Republican staff director of the Judiciary Committee, but he would provide details.

President Clinton has nominated Justice Barlett, the first woman to be appointed Chief Justice in Florida, to a seat on the United States Court of Appeals for the 11th Circuit, in Atlanta. The nation's

lice Bartlett's record as a Florida judge and invited recipients to use any of the materials as long as they did not attribute them to Mr. Distler. It included broad characterizations of her as soft on crime.

But not D'Alembert, a Tallahassee lawyer and former president of the American Bar Association, said the materials sent by Mr. Distler was a shoddy attempt to discredit Justice Bartlett's record.

But Senator Hatch said that even though he agreed that the way the materials were sent was unethical, he believed the information was factual.

largely accurate. And he said he con-

democratically enacted laws in order to bring about what the riffraff really want."

The dispute over the Disler materials demonstrates two features of the contemporary judicial confirmation process. First, the Senate Republicans are feeling their way in a new role with a Democrat in the White House. For the last 12 years, the Senate Republicans have largely been devoted to pushing the nominations coming out of the Republican White House.

Grass-Roots Strategies

And since the 1987 defeat of Judge Robert H. Bork's nomination to the Supreme Court, it has become accepted wisdom that the Senate will reject a judicial nomination only if there is a grass-roots campaign that puts pressure on the committee.

The effort to inaugurate grass-roots opposition to the light when a columnist for *Washington Sentinel*, Charley Reese, wrote this whistling: "Mr. Reese, who is a good fellow, and who carried a conservative column, said he received an unsolicited 'huge package of several pounds' from Mr. Disler, whom he said he had never met. It was offered that taxpayer money be used to pay for an understanding pamphlet," Mr. Reese said. He said he attempted, "Mr. Disler to confirm that the money had come from him." He said: "Sure, if you're going to write something on this, I'd like you to call me." Reese said he told Mr. Disler, "I certainly would."

Reese's column, headlined "Taxpayers' Column," was a scathing attack on artists waste taxpayer dollars to "keep the lights on" in the Senator Hatch office. Disler, who Reese declined to comment on,

November 8, 1993

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Back Barkett

U.S. Sen. Connie Mack's hesitancy in supporting the nomination of a member of the Florida Supreme Court to the 11th U.S. Circuit Court of Appeals is puzzling.

President Clinton has nominated Chief Justice Rosemary Barkett to fill a seat on the appellate court that has been vacant for four years.

Not only is it in order for the Senate Judiciary Committee to get on with Barkett's confirmation hearing, Mack should be standing alongside Sen. Bob Graham in supporting her nomination.

As recent as last year, Florida voters stamped their approval on Barkett in voting to retain in her office.

The fact she has been endorsed by the Florida electorate surely must have some bearing on Mack. More importantly, however, she believes issues should be decided on their merit, not ideology and that personal feelings should not be a factor in deciding on the constitutionality of a law.

Despite some critics who claimed she was soft on crime and opposed her retention on the state court in the 1992 general election, Barkett has voted to uphold the death penalty more than 200 times. Overall, she has sided with the majority on the state court 91 percent of the time.

Mack should delay not longer in pushing for her early confirmation.

Opinion

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EDITORIALS

Leakers, liars and low blows

The dissemblers are at it again. Staffers for the Senate Judiciary Committee apparently have a lot of time on their hands. If their behavior in general, and their obsessive treatment of the Packwood proceedings in particular, weren't evidence enough, consider a recent case brought to light by columnist Charlie Reese.

Reese received from the Senate Judiciary Committee's Mark R. Disler, Republican staff director, "analyses" of the record of Florida Supreme Court Justice Rosemary Barkett, nominated to be a federal appeals court judge in the 11th Circuit.

These documents singled out for ridicule and attack certain cases Barkett had been involved in.

Sound familiar? The same campaign was used against Barkett during her 1992 retention campaign in Florida. The charges were discredited by journalists, lawyers and fellow judges. More important, they were discredited by voters, who

Public funds pay for private attacks

returned Barkett to the Supreme Court by a considerable margin.

These analyses were not to be attributed to Disler (which immediately makes one question their veracity), but were free for use.

When this campaign was exposed, Disler's boss — Sen. Orrin Hatch, R-Utah — promised disciplinary action, though the nature of that action was unspecified.

We have some suggestions.

It is misuse of funds when public employees at public expense distribute disinformation against other officials, whatever the politics involved.

Hatch should not keep people like Disler in his employ. Disler should find work with those groups he so willingly supports at our expense, and take any like-minded leakers and liars along with him.

Miami Times

November 18, 1993

Barkett a superb judge

The U.S. Senate has a splendid chance to enhance the 11th U.S. Court of Appeals in Atlanta by confirming President Bill Clinton's nominee, Justice Rosemary Barkett. The only woman on the Florida Supreme Court, she was nominated for the federal appeals bench earlier this year and has been dogged by conservative critics whose only concern seems to be that she may be "soft" on crime and is anti-capital punishment.

That has been forcing Justice Barkett and her supporters to go out of their way to show that she voted to uphold the death penalty some 200 times. And that is a pity. If the conservatives in Florida and elsewhere are so gung-ho on judicial murder, they should push for members of the Ku Klux Klan to become judges. After all, the KKK does have an excellent history of doing away with Black people—who are the ones disproportionately put to death in this country.

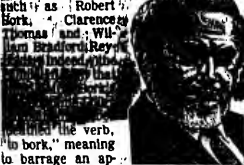
The debate should focus, rather, on whether Justice Barkett can meet the time-honored test of being a good judge, that of being able to hand down justice tempered with mercy. That she has done. It goes without saying that she is a firm believer in the law; it is also clear that she is a compassionate person who has made an invaluable contribution to the state high court.

Conservatives Tear a Page From Liberals' Book, 'Borking' Clinton's Nominees for Legal Positions

By PAUL M. BARKETT

WASHINGTON—The "Borking" is back, with the roles reversed.

During the Reagan-Bush years, the right decried liberal attacks on judicial nominees such as Robert Bork, Clarence Thomas and William Bradford Hu-



Robert Bork

acinated the verb, "to bork," meaning to barrage an appointee with sensational-sounding excerpts from a past opinions, writings or speeches.

Despite their protests about liberal tactics, however, conservatives have put together a potent borking machine of their own. Its key components: Republican Senate aides who compile negative dossiers on nominees; like-minded outside groups that seek to stir up "grass-roots" opposition; and conservative columnists, whose simultaneous alarms can create a powerful echo effect.

It's Our Turn Now

Liberals stopped Robert Bork's nomination for the Supreme Court; liberals almost stopped Justice Clarence Thomas, says Thomas Jipping of the Conservative Free Congress Foundation. And Mr. Reynolds was rejected for the No. 1 spot at the Justice Department. "It's our turn now," Mr. Jipping declares.

The big conservative victory so far has been blocking Earl Ginnier from becoming the Justice Department's civil-rights chief. Bill others are currently under fire, including Rosemary Barkett, a federal appeals court nominee, and William Gould, the would-be chairman of the National Labor Relations Board.

The connection to past battles is quite direct in some instances. Janet Napoliitano, Mr. Clinton's choice to be U.S. attorney in Phoenix, generated GOP hostility because of her refusal to discuss confidential aspects of her work as counsel to Anita Hill, who accused Justice Thomas of sexual harassment. Questions about Ms. Napoliitano's role were first raised by conservative Journalist David

the American Spectator and the Washington Times. After using procedural maneuvers to delay Ms. Napoliitano's confirmation for months, Republicans relented on Nov. 19 and allowed her to be confirmed for the post.

In pressing aggressive challenges to Clinton appointees, the conservatives "are borrowing a page from our book," says Nan Aron, who as director of the Alliance for Justice, a consortium of liberal groups, coordinated opposition to Reagan and Bush appointments. Conservatives "know that like their liberal counterparts in the 1980s they have the resources to try to stop only a tiny fraction of the president's nominees.

"The goal is to force Clinton . . . to expend as much political capital as possible," says Clint Bolick of the libertarian-conservative Institute for Justice. He helped lead the blitz on Ms. Ginnier with a slashing editorial-page article in this newspaper. "If we succeed even in only a few cases," Mr. Bolick adds, "we may discourage the White House from choosing people with more extreme philosophies."

Attack on Gould for NLRB Post

Republicans, for example, probably don't have the votes to kill Mr. Gould's nomination to head the labor-relations board. But they hope that by tying up the liberal Stanford law professor's appointment, they can influence the White House to name a more pro-business person for another vacancy on the NLRB. So, in an attack some business lobbyists describe privately as "borking," Mr. Gould is being depicted as a "radical" for having advocated pro-union legal changes in his academic writings.

In a new twist on earlier liberal strategy, the conservative opposition also involves covert efforts by some GOP Senate aides to incite editorialists and the public. After President Clinton announced in late September that he wanted to promote Judge Barkett from chief of Florida's top court to a spot on the federal appeals court in Atlanta, aides to GOP Sen. Orrin Hatch of Utah went to work. They combed the 64-year-old jurist's lengthy record to find examples of her liberal "activism," especially any opposition to death sentences in grisly murder cases.

In due course, Sen. Hatch, the ranking Republican on the Judiciary Committee, announced that he was "deeply troubled" by Judge Barkett's views on capital punishment. Behind the scenes, Mark Dieler, a senior Hatch aide, circulated anti-Barkett memos to presumably sympathetic colum-

nists, urging them to use the material, but not identify its source.

A mini-wave of anti-Barkett editorials appeared. But then, columnist Charley Reese of the Orlando Sentinel, a recipient of the Dieler package, blew the whistle on the Hatch aide. In response, Sen. Hatch publicly disavowed any involvement. But for not following "proper procedure," but added that the memos were accurate.

Similar tactics were used against Attorney General Janet Reno when she was nominated in February. According to Senate staff members, John Bliss, an aide to GOP Sen. Hank Brown of Colorado, along with a since-fired lobbyist for the National Rifle Association, helped spread allegations that Ms. Reno had a drinking problem—something she flatly denies.

John Thompson, a longtime Reno political foe from Miami, has submitted a sworn affidavit to the Senate Ethics Committee as part of a complaint alleging that Mr. Bliss prodded him to leak the drinking story to the press. Senate Republicans "were attempting to smear [Ms. Reno] through someone else, without having their fingerprints on the thing," Mr. Thompson says in an interview.

As he did when the Capitol Hill newspaper Roll Call first reported on the flap, Mr. Bliss says he was merely investigating allegations that turned out to be unsubstantiated. "We didn't go to [Mr. Thompson]; he came to us," the aide says, adding, "I never sought to share the information with the press." Sen. Brown blamed the rumors on Mr. Thompson and voted to confirm Ms. Reno.

Technological Sophistication

Another thing that distinguishes the new borking from the old is increased technological sophistication, epitomized by the Free Congress Foundation's satellite video network. Started in 1991 to mobilize conservative groups around the country, the network is scheduled to expand to 24-hour-a-day cable service next month.

Mr. Jipping has appeared repeatedly on Free Congress telecasts, exhorting viewers to rise up against Judge Barkett because of what he says are her votes to

spare some heinous killers from execution. The sermons have ignited anger among people such as Dale Switzer, the Tulsa, Okla., liaison of the Christian Coalition, a national organization headed by evangelist-politician Pat Robertson.

"For some reason, [Mr. Jipping's pitch] lit my fire," says Mr. Switzer, who has launched an anti-Barkett letter-writing drive aimed at Oklahoma Sens. David Boren, a Democrat, and Don Nickles, a Republican.

Sen. Hatch has succeeded in getting Judge Barkett's confirmation hearing put off until next year, but it's still far from certain that she will be stopped. She received the American Bar Association's top rating and has a plausible response to the charge that she is "soft" on the death penalty: She has voted more than 200 times to affirm capital sentences.



Rosemary Barkett

The New Yorker

December 20, 1993



CLINTON'S JUDGES

GEORGE BUSH has been out of there for less than a year, and already it's hard to remember much of anything about his Presidency—except that he waged the Gulf War and appointed David Souter and Clarence Thomas to the Supreme Court. In the long view of history, the appointments will probably loom larger than the war. In fulfilling their constitutional duty to populate the federal judiciary, Presidents leave a legacy that long outlasts them. Federal judges hold office for life; they serve as arbiters of the Constitution's magnificent—and magnificently vague—commands; on issues as various as racial equality, personal privacy, and religious liberty, they shape the society in which we live. Whatever questions may obsess and torment us in the future (Do clones have inheritance rights? Are speed traps permissible on the information highway?), we can be pretty sure that federal judges will have the last word on them.

With Congress in recess, President Clinton has done all the judicial nominating he can do for his first year in

office, and it is possible to make an early assessment of how he has discharged this pivotal duty. He turns out to have launched a quiet revolution in the "diversity"—Beltway shorthand for ethnic and gender heterogeneity—of the federal judiciary. A glance at the record of his predecessors shows the dimensions of the change. According to a comparative analysis by the Clinton White House Counsel's Office, Jimmy Carter, by Thanksgiving of his first year in office, had nominated thirty-four judges, one of whom was a woman; in that same span, Ronald Reagan had nominated forty, two of them women, and George Bush had nominated twenty-three, four women among them. Bill Clinton has nominated forty-eight judges—and eighteen of them are women, including, of course, his most important appointee, Justice Ruth Bader Ginsburg of the Supreme Court. The same pattern holds true for minorities. In the first eleven months of their terms, Carter nominated five black or Hispanic judges, Reagan one, and Bush two. Clinton has nominated fourteen. To put it another way,

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eighty-two per cent of Carter's first-year nominees were white males, and so were ninety-two per cent of Reagan's and seventy-four per cent of Bush's, while only thirty-eight per cent of Clinton's first-year nominees to the federal bench were members of that not yet long-suffering breed. The first-year trends among Clinton's predecessors continued with little change, and it's logical to expect this President to maintain his pace as well.

All this good news on the diversity of Clinton's nominees would be bad news indeed if the President had achieved diversity at the expense of quality. But, if the ratings of judicial candidates put out by the American Bar Association are any guide, that hasn't happened. Of the Clinton nominees rated so far this year, three-quarters have received the A.B.A.'s "well qualified" label—a higher percentage than Carter's, Reagan's, or Bush's first-year nominees achieved. A look at a few of the nominees themselves shows what's behind this favorable consensus. In New York, for example, Pierre N. Leval has long been among the region's most eminent district-court judges; he richly deserved to be elevated to the court of appeals. Dean David Trager of Brooklyn Law School, who likewise has a long and distinguished record in public service, clearly belongs on the district-

court bench. Highly qualified nominees of diverse backgrounds have been the rule throughout the country. Martha Craig Daughtrey, whom Clinton appointed to the court of appeals, was the first female prosecutor in Tennessee, the first woman to serve as a state-court judge in Tennessee, and the first woman to serve on that state's supreme court. Martha Vázquez, an appointee to the district court in New Mexico, is the daughter of Mexican immigrants and is a distinguished trial lawyer. And Nancy Gertner, a nominee to the district court in Massachusetts, has been a leading civil-liberties practitioner and a professor at Harvard Law School.

The nominee who has generated the most controversy may be the most highly qualified of all. The life story of Rosemary Barkett reads like a gloss on the American dream. She was born in 1939 in a small town in Mexico. Her parents, who were immigrants from Syria, had sixteen children, of whom only five survived. The Barkett family moved to Miami when Rosemary was five. About the time she turned eighteen, she became both a Roman Catholic nun and a United States citizen. After teaching school for several years, she graduated from college, and then, having left the convent, she graduated near the top of the University

of Florida College of Law's class of 1970. Following a successful stint as a litigator, Barkett became a lower-court judge in the Florida state system in 1979, and by 1985 she had worked her way up to an appointment to the Florida Supreme Court. As a justice on that court—she is now its chief justice—she won a reputation as one of the most progressive and intelligent judges in the nation, gaining particular notice for her 1989 vote that the Florida Constitution protects a woman's right to choose abortion.

A handful of conservative critics have assailed Barkett for insufficient zeal in support of Florida's death-penalty statute. One may question whether such zeal is something to be desired in a judge; in any event, Barkett has shown nothing but evenhandedness in enforcing that doleful law, voting more than two hundred times to approve death sentences. Barkett's opponents managed to prevent her confirmation to a seat on the court of appeals from going forward before Congress adjourned in November, but, since she has virtually the entire Florida legal establishment behind her—and most of the state's major newspapers as well—she stands every chance of winning approval early next year.

Clinton's nominees are different from those of his Republican predecessors in more surprising ways, too. Bush and, especially, Reagan nominated any number of aggressively opinionated young academics to the federal bench. Clinton has resisted the temptation to match that record ideologue for ideologue; rather, he has drawn in significant measure from a deep pool of judges on state courts, which served as a refuge for many moderate jurists over the past twelve years. Nor has Clinton sought to magnify his legacy by reaching out for notably youthful nominees; his selections include many judges in their fifties and a few in their sixties. It's true that, as the *Washington Post* pointed out the other day, the Clinton judge-picking machinery has moved slowly, and that the age factor will cause vacancies to remain endemic in the system. But this President seems to recognize that, in the long run, who the judges are rather than how long they serve will determine their contribution to the judicial system and the nation. *

St. Petersburg Times
12-21-1993

Important support for Barkett

Some right-wing lobbying groups based in Washington had been hoping that U.S. Sen. Connie Mack of Florida would lend respectability to their underhanded efforts to bring down the federal appeals court nomination of Florida Supreme Court Chief Justice Rosemary Barkett. Last week, though, Mack finally joined virtually every other prominent Florida public official in calling for Barkett's confirmation.

Mack, a conservative Republican, didn't pretend that he and Barkett agree on every philosophical issue. In the end, though, he concluded that Barkett is "a decent, caring, experienced and intelligent jurist" who "deserves to be confirmed."

Mack's support should be the end of this issue. A year ago, Barkett easily won a statewide retention vote despite a similar campaign on the part of conservative groups opposing her. That election, combined with the public endorsement of Mack, U.S. Sen. Bob Graham and other top offi-

cials, should answer any questions about Barkett's support among Floridians.

In all likelihood, though, Washington-based groups such as the right-wing Free Congress Foundation will continue their campaign to distort Barkett's record to the point that Floridians might no longer recognize her. Their real agenda is to embarrass President Clinton, even if it means disregarding the wishes of Floridians who know Barkett best.

The Senate should not simply rubber-stamp presidents' judicial nominations. Those nominees who lack the requisite experience or whose views are clearly outside the mainstream should be kept off the federal bench. However, Mack set a sensible standard for judging Barkett and other judicial nominees. "The question I ask myself is whether the nominee is capable, a person of integrity and falls within reasonable philosophical bounds," he said. "For Justice Barkett, the answer is yes."

That answer, coming from Florida's most prominent conservative Republican, should satisfy the Washington interest groups. It probably won't, though. They have to be busily involved in a campaign against *somebody* in order to justify their own existence.



Connie Mack set a sensible standard.

EDITORIALS

Connie Mack comes around *Plan summary Sub 10-22-93*

Connie Mack is a politician who resists being stereotyped. Florida's junior senator is normally a conventionally conservative Republican whose stances are indistinguishable from those of Bob Dole or other GOP members of the U.S. Senate. He's against taxes, the president's health-care plan, abortion, etc.

Senators support Barkett

a Miami rap music group to use obscene, misogynistic lyrics in its live performances and recordings. Spitting from other Republican officeholders, Mack said the music may have been repulsive but was constitutionally protected. Somehow, the crisis passed.

Last week, Mack surprised his Republican colleagues again. Just as they were gaining momentum in the effort to deny a federal appellate court judgeship to Florida Supreme Court Chief Justice Rosemary Barkett, Mack announced his support for her nomination. The announcement by Florida's highest-ranking Republican probably took the wind out of the

opposition's sails.

Mack said he didn't necessarily agree with every position that Barkett — who was nominated for the federal judgeship by President Clinton — has taken on cases ruled on by the Florida Supreme Court, but he was satisfied that she "is a decent, caring, experienced and intelligent jurist."

While he said he would have nominated someone else if the nomination were under his control, he saw no reason for the Senate to refuse confirmation. "The question I ask myself is whether the nominee is capable, a person of integrity, and falls within reasonable philosophical bounds," Mack said. "For Justice Barkett, the answer is yes."

Mack also showed deference to his constituents. Florida voters returned Barkett to the Supreme Court with 80 percent of the vote in 1992, even though some of the same liberal vs. conservative arguments were made against her during that campaign.

You may not always agree with Connie Mack, but it's hard to deny that he thinks for himself. It's a valuable characteristic for an elected representative of the people, and it may help explain why Mack thus far has no serious opposition to his own re-election in 1994.

The Atlanta Journal

THE ATLANTA CONSTITUTION

SUNDAY, DECEMBER 26, 1993

Conservatives hoping to 'Bork' Clinton federal court nominee

By Bill Rankin
STAFF WRITER

When she first set foot on U.S. soil in 1945, Rosemary Barkett was 6 and the only English words she knew were "hello," "goodbye" and "New York Yankees."

Now, appointed by President Clinton to the 11th Circuit Court of Appeals in Atlanta, she is under siege by conservatives who find her "breathakingly radical."

She is, as Washington insiders say, being "Borked."

"Whatever it is," Barkett, 54, said in a recent interview, "I don't like it so good."

Born in Mexico to Syrian parents, Barkett is a former nun and the first woman to be named chief justice of the Florida Supreme Court. When she was nominated to the 11th Circuit in September, she won the highest rating of the American Bar Association.

But the nomination quickly came under attack by conservatives who accuse her of

being soft on crime and deride her decision in a 1989 abortion case that dropped parental-notification requirements for minors.

"Borking" means the use of sensational tactics to mount a grass-roots campaign of opposition. Such tactics shot down the U.S. Supreme Court nomination of federal Judge Robert Bork in 1987 and narrowly missed keeping Clarence Thomas off the bench. Both were GOP nominees, and Republicans candidly admit they are seeking revenge.

On a weekly basis since October, she has been vilified by the conservative Free Congress Foundation in letters to its members.

"Barkett blames everyone but the killer," one mailing proclaimed. "She is breathakingly radical," said another. "The 700 Club," a television show founded by Pat Robertson, also criticized her nomination.

The attacks have delayed Barkett's confirmation hearings, and no date has been set

Please see **NOMINEE**, A9 ▶



Rosemary Barkett, nominated for a seat on a federal appeals court.

Continued

Nominee: 'Radical' or 'courageous'?

► Continued from A1

for them, said a Senate Judiciary Committee aide.

Her sponsor, Sen. Bob Graham (D-Fla.), who as governor in 1979 gave Barkett her first judgeship, is both chagrined and surprised.

"She is the antithesis of the reasons why Bork was not confirmed," Graham said. "He was distant and removed and saw the law as an intellectual chess game. Rosemary is passionate, cares about people and has served with distinction."

Her nomination received a big boost recently when Connie Mack III, Florida's GOP senator, announced his support after weeks of deliberation.

Although Mack acknowledged he has philosophical differences with Barkett and that she would not have been his choice, he called the nominee a person of integrity who deserves Senate approval.

If confirmed, Barkett would be the 11th Circuit's first Democratic appointee in 14 years. The court, one rung down the ladder from the Supreme Court, takes federal appeals on criminal and civil cases from Alabama, Florida and Georgia. This includes civil rights claims, antitrust and contract disputes, constitutional issues and personal injury lawsuits.

The circuit, once known for its landmark integration rulings, has grown increasingly conservative since Presidents Ronald Reagan and George Bush filled the 12-member court with five appointees.

Reputation for preparation

Barkett said she gets much of her resolve and independence from her parents, who left Syria for the United States in 1920.

Because of immigration quotas, they waited in Mexico for more than 20 years before going to Miami.

In Mexico, her father was a mountain peddler who eventually earned enough to run a wholesale goods store. Spanish and Arabic were spoken in their household.

Once in Miami, her father ran a grocery store a few blocks from the Orange Bowl. Her parents — Assad, 94, and Maria, 88 — will celebrate their 75th anniversary next year.

Although she aspired to be an actress, Barkett entered a convent at age 17, the year she became a U.S. citizen. As a nun, she taught classes throughout Florida for eight years.

She left the convent, she says, because "I thought I could be more relevant to the needs of people in more direct ways."

After college, Barkett, who is single, entered the University of Florida Law School and graduated first in her class. Eight years of private practice and six years on the bench led to her appointment

Rosemary Barkett

► Age: 54

► Family: Single

► Birthplace: Ciudad Victoria, Mexico

► Professional: Chief Justice, Florida Supreme Court, 1992-present; justice, 1985-present; trial and appellate judge, West Palm Beach, 1979-85.

► Education: University of Florida Law School, 1970; Spring Hill College, Mobile, Ala., 1967.

► Other: Formerly a nun, known as Sister St. Michael, in the order of Sisters of St. Joseph in St. Augustine, Fla., 1957-66.

STAFF

Court

On the high court, Barkett quickly became known for her meticulous preparation. Lawyers would marvel at how often the lights in her second-floor office were aglow late into the night.

Barkett also helped decide cases that distinguished her as a champion of individual rights. She issued rulings that are more expansive on some issues, such as the right to privacy and protection from search and seizure, than precedents set by federal courts.

"She's written some courageous decisions," said Jonathan Glogau, an assistant state attorney general. "I'd say she could be called old-fashioned, with old-fashioned meaning the Supreme Court of Earl Warren."

She doesn't fear a fight

One of her most publicized — and controversial — opinions was a 1990 ruling that random drug searches of bus passengers by Broward County deputies was unconstitutional.

"The intrusion upon privacy rights by the Broward County policy is too great for democracy to sustain," Barkett wrote. "Nazi Germany, Soviet Russia and Communist Cuba have demonstrated all too tellingly the effectiveness of such methods."

The decision was overturned by the U.S. Supreme Court, and Barkett has not been reluctant to take a swipe at that court.

In an opinion earlier this year, she criticized the landmark U.S. Supreme Court ruling that bars the use of statistics to prove racial discrimination in death penalty cases.

In the case of Warren McCleskey, who was put to death in Georgia's electric chair in 1991, the U.S. Supreme Court ruled a conviction cannot be overturned if statistical evidence shows racial bias by the prosecution. Capital convictions can be overturned, the court said, only if intentional discrimination can be proved.

Such proof, Barkett wrote in a decision overturning the death sentence of a Florida man, "is virtually impossible to show." She predicted the high court eventually will recognize that its standard is "insurmountable."

"She is not afraid to wrestle with the difficult cases," said the defendant's lawyer, Steven Hawkins of the NAACP Legal Defense and Educational Fund.

Opposition on the right

Although Barkett won her retention election last year with 61 percent of the vote, she was strongly opposed by the National Rifle Association and anti-abortion groups.

Florida Right to Life criticized her vote in a 4-3 decision by the court in 1989 that said an abortion law requiring parental consent for minors violated the state constitution's privacy provision.

"I was compelled by the Florida Constitution to support that opinion," she explains. "I'm really at a loss as to why I'm being attacked for following the law."

As to criticism that she is "soft on crime," Barkett wonders, "I don't understand what that means. I like crime? It's a silly phrase, and it's not true. I'm true to the constitution."

Graham is quick to note that Barkett voted more than 200 times to affirm the death penalty.

"I realize they're not happy with me," Barkett said of Free Congress. "But their concern is not with me, it's with the law. The law is you cannot impose the death penalty every single time that there's a murder. The U.S. Supreme Court said that."

Talbert D'Alemberte, a Tallahassee lawyer and former president of the American Bar Association, said, "When you look at her opinions and other work in their full context, there's no way in the world any attack against Rosemary Barkett will succeed."

Barkett said she is eager to testify in confirmation hearings because she fears her views and opinions are being distorted by her critics.

"If they don't like the views I give, fine," she said. "But not to give me the chance to respond to what others have said — and I think very shakily said — is the essence of unfairness."

**NOMINATIONS OF SAMUEL FREDERICK
BIERY, JR.; WILLIAM ROYAL FURGESON,
JR.; ORLANDO LUIS GARCIA; JOHN HENRY
HANNAH, JR.; AND JANIS ANN GRAHAM
JACK, TO BE U.S. DISTRICT JUDGES**

THURSDAY, FEBRUARY 24, 1994

**U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.**

The committee met, pursuant to notice, at 11:04 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Howell Heflin presiding.

Also present: Senator Brown.

OPENING STATEMENT OF SENATOR HEFLIN

Senator HEFLIN. The hearing will come to order.

I do not believe that Senator Hutchison has come in. When she comes in, we will take her.

Chairman Brooks, I think this is an all-Texas day. I think it is nearly as important as, what is it, June 10th Day or something like that you have in Texas? But, anyway, what we will do is let the Congressmen introduce anyone or say whatever they would like to say about the nominees, and realizing that the Texas Congressmen are busy and have to do other things, they can be excused and we will then proceed with the nominees.

Senator Hutchison has come in, and, Senator Hutchison, if you would have a seat here, we will let you proceed. Since you are here, what we will do is start by letting you introduce anyone that you want to, and then I am going to call on Congressman Brooks to give an overall view of them, and finally the individual Congressmen can introduce any of the nominees.

Do you have some opening statement or introductions that you would like to make, Senator Hutchison?

**STATEMENT OF HON. KAY BAILEY HUTCHISON, A U.S.
SENATOR FROM THE STATE OF TEXAS**

Senator HUTCHISON. Yes, Mr. Chairman, I do. I am very pleased to be here, and I am glad that you are going to take up all of our fellow Texans together, or at least these five.

Let me say that Senator Gramm and I put together a bipartisan committee of lawyers to give us an evaluation of all of the nominees, and all five of those nominees were said to be satisfactory by our committee. And I have also had a chance to meet with one of

them that I did not know, Janis Graham Jack, and I was very impressed with her.

I want to particularly note, though, the two that I have known for a long, long time. John Hannah has been a distinguished U.S. attorney. He has been secretary of state and is the sitting secretary of state of Texas right now, and I believe he is an outstanding person who will fill this job very well.

Royal Furgeson is someone with whom I shared a freshman class at the University of Texas Law School. I have known him for a long time. He has been president of the University of Texas Law Alumni Association, and he is one of the finest individuals and best friends that I have ever had. And I could not recommend anyone more highly than Royal Furgeson.

So I am pleased to be here and say that I do support all five of our nominees and to give special note to those that I have worked with over the years. And I think the President has made some very good selections here today.

Thank you, Mr. Chairman.

Senator HEFLIN. I would call on Chairman Brooks, if he would make any remarks now.

STATEMENT OF HON. JACK BROOKS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. BROOKS. Thank you, Mr. Chairman. It is a pleasure to be over here with you in the Senate and to join with Kay Bailey Hutchison, our junior Senator from Texas. And I want to say that I am delighted that you and Phil Gramm agree with our choices, our selections.

As dean of the Texas delegation and on behalf of and with John Bryant of Texas and Ron Coleman from El Paso and Mr. Tejeda from San Antonio, we are here today to introduce to our distinguished Senate colleagues the nominees for U.S. district judge in the State of Texas, and I want them to just stand up.

John Hannah is nominated for the eastern district, and Janis Jack for the southern district; Fred Biery, Orlando Garcia, and Royal Furgeson for the western district.

John Hannah right now is the secretary of state, and he has a distinguished record. He was a U.S. attorney, and he has had broad legal experience. You get pretty broad experience in Angelina County quick.

Janis Jack is a private lawyer in the Corpus Christi area and ran a successful law practice and has been active in the legal community. She is now legal counsel for Planned Parenthood of south Texas and honorary trustee for the Coastal Bend Council for the Deaf. She is a pretty public-spirited young woman and a fine lawyer.

Fred Biery and Orlando Garcia are both justices on the Fourth Court of Appeals in San Antonio, and Mr. Biery served on the district court and county court at law, is past president of the San Antonio bar, the William Sessions Chapter of American Inns of Court, and currently he is a member of the Texas Democratic Finance Council and board of regents of Texas Lutheran.

Judge Garcia represented Bexar County in the Texas House of Representatives from 1983 to 1991, has a gubernatorial appoint-

ment to the Texas Punishment Standards Commission. He is involved with the San Antonio Bar Association. Both Judge Biery and Judge Garcia have solid judicial records and have received strong support from lawyers in both parties from the San Antonio area.

Royal Furgeson is a shareholder with the law firm of Kemp, Smith, Duncan & Hammond, and he has an outstanding legal record, active in the forward progress of the legal profession. He has been involved in the United Way, YWCA, the Greater El Paso Chamber of Commerce, and I think he will bring experience and judgment to the bench.

I want to thank you for your consideration of these five eminently qualified nominees, and they exceed the normal standards for U.S. district judges. And if you would let me yield to the other members briefly, we will conclude our statements. Thank you for your graciousness in hearing us so promptly.

Mr. Coleman.

**STATEMENT OF HON. RONALD D. COLEMAN, A
REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS**

Mr. COLEMAN. Thank you, Mr. Chairman. Thank you, Chairman Brooks. It is good to be here.

Mr. Chairman, I am pleased to be with you to introduce my friend and my constituent from El Paso, TX, Mr. Royal Furgeson. He appears today as part of the Senate confirmation process. Last year President Clinton nominated him for a Federal district judgeship for the western district of Texas. I am proud to associate myself with Royal Furgeson. He is well known and highly regarded not only in my community but, as Senator Hutchison said, throughout the State of Texas. He is an outstanding lawyer. He is a community activist. He is a volunteer.

His tireless efforts on behalf of women and minorities in my community is well documented. He is sensitive to the issues of importance to the Hispanic community. He is aware of problems facing working families, aware of problems of children who live without running water or sewage facilities in their homes. He is aware of problems facing immigrants who speak no English. He is a leader. He is a family man, a unique person with religious convictions. It is interesting to note that I consider him not just unique but ordinary as well at the same time. He has a great sense of humor.

Royal Furgeson will make an outstanding judge. His professional demeanor and temperament lend themselves to service on the bench. I wholeheartedly endorse his candidacy and recommend him to you.

Thank you, Mr. Chairman, for the time.

Mr. BROOKS. Mr. Bryant, the gentleman from Dallas.

**STATEMENT OF HON. JOHN BRYANT, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF TEXAS**

Mr. BRYANT. Thank you. I appreciate the opportunity to speak before you today, Mr. Chairman, and express my gratitude to Senator Hutchison for her very statesman-like analysis of these nominees as well.

I have a close relationship with three of them here today, so it is a real unusual day for me to get to see three very fine people with whom I am well acquainted come before you.

John Hannah, who is my constituent from Tyler, TX, served as a reform member of the Texas State legislature back when that was not fashionable and was a reform activist; after that, U.S. attorney; secretary of state for our State now for a number of years; and is, I think, really well qualified not just on the basis of his experience but his character and his general outlook to be a U.S. district judge in our part of the State.

Also, Orlando Garcia, with whom I served in the Texas Legislature, is a great individual. He has served with great distinction on the court in San Antonio. And my former law school classmate, Fred Biery, also has served with great distinction on the court in the San Antonio area for many years as well.

These are fine people, and I commend them to you, and I am glad for the opportunity to be able to speak up for them today.

Mr. BROOKS. Mr. Tejeda, from San Antonio.

STATEMENT OF HON. FRANK TEJEDA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. TEJEDA. Thank you, Mr. Chairman. Chairman Brooks, I am glad to introduce two of my hometown constituents here from San Antonio, but I would also like to introduce a very special friend from San Antonio—Mary Alice Cisneros. Mary Alice is the wife of Secretary of HUD Henry Cisneros, and she is here because she has some special friends here from San Antonio also.

But I am honored today to introduce to you two outstanding jurists from my home town of San Antonio, each of whom has been nominated by the President to serve as district judges for the western district. Confident in their legal acuity and their dedication to public service, I am greatly pleased to again introduce to you Judges Fred Biery and Orlando Garcia. Both of these gentlemen currently serve as justices on the fourth court of appeals in Texas where they hear cases spanning the full spectrum of law. I have known both for years and speak for many in describing my respect and admiration for their many accomplishments.

Judge Biery served on the bench for the past 15 years, working his way up from county court at law judge to a trial judge in the district court, and most recently as an appellate judge on the court of appeals. He has earned the respect of his peers and works extremely well with his colleagues, leading some to describe him as a judge's judge. Judge Biery has given time to the community as well, serving on the board of regents of his alma mater, Texas Lutheran College, and from 1987 to 1988 as president of the San Antonio Bar Association. I have no doubt that he will continue to earn our respect and admiration as he assumes the new responsibilities of a Federal district judge.

Judge Orlando Garcia's career more closely resembles many of ours. After beginning in private practice with State Representative Matt Garcia, Judge Garcia himself was elected to the Texas State Legislature. He served with distinction on the Texas House of Representatives' Committees on Appropriations, Corrections, Higher Education, and the Budget Committee. Judge Garcia and I worked

together on many important legislative projects in the State legislature, and I always found him acutely sensitive to the needs of the people he served. He will bring that sensitivity to the cases he will hear as Federal judge.

Since his election to the bench in 1991, Judge Garcia has spoken on topics ranging from family law to appellate procedure. He, too, has involved himself in community activities such as the Rape Crisis Counseling Center and service on a local school district's Drug Advisory Committee. Recently, Judge Garcia has served on the Texas Punishment Standards Commission and the Texas Judicial Council after appointment by Gov. Ann Richards.

Both judges bring with them unique insights and skills. They complement each other and the other judges on the bench with whom they serve. They will continue on the path of distinction and make us all proud. I highly endorse and recommend their confirmation.

Again, I thank you for your attention and present to you Judges Fred Biery and Orlando Garcia. Thank you, Mr. Chairman.

Mr. BROOKS. Thank you, Mr. Chairman. That concludes the House presentation. If there are any questions, we will be glad to answer them.

Senator HEFLIN. Well, do you all vouch for them now?

Mr. BROOKS. Yes, we are for them. We think—

Senator HEFLIN. I want to know this: I hear more complaints as I go all over the country and I listen to Senators and Congressmen that Federal judges, after they get appointed, they seem to think that they are anointed.

Mr. BROOKS. That is different now. They are good now.

Senator HEFLIN. Some of them get to be arrogant. Some of them get to be discourteous to the lawyers, to the people that come before them, to jurors and everything else. Now, are you going to vouch for the fact that they are going to be courteous and not arrogant and domineering?

Mr. BROOKS. We have got an alternative. You can always impeach them. If the Judicial Council catches them when they are wrong—

Senator HEFLIN. Well, that is about an impossibility.

Mr. BROOKS. It is tough to do. We ought to make them reconfirmed, re-up about every 10 years.

Senator HEFLIN. All right.

Mr. COLEMAN. Mr. Chairman, if I could just comment on that. One of the problems, honestly, in the western district of Texas has been the overworking of the Federal judges. I always like to point it out because we do not get appointments fast enough and we do not get confirmation fast enough. Out in the western district, we have people—you may remember a Federal judge named Judge Sessions, Bill Sessions, later Director of the FBI. I practiced in front of his court. And one of the problems was that those clerks would keep him working 15, 16 hours a day to keep up with the workload.

It is very difficult, and we need to really, I think, continually analyze—as we have done in creating new judgeships for the western district—the workload that we place upon these Federal judges. I think sometimes it is not necessarily just the black robe, Senator,

but I think the work hours that we require of a lot of our Federal judges. I want to speak out in support of creating more of them.

Senator HEFLIN. All right.

Mr. BROOKS. I have got a weighted workload study that I have done, Senator, on various judges. I will get that over to you, and you can analyze then which judges work very hard, which of them do not, which of them go to Puerto Rico every winter. You know, they have a pretty good drill worked out. I will give you that analysis of average workloads. It is interesting. Some of them work very, very hard. Some of them have a lifetime appointment.

Senator HEFLIN. Well, working hard does not necessarily have anything to do with courtesy.

Mr. BROOKS. No, no. I understand.

Senator HEFLIN. That is what I am trying to impress upon these judges—the need for courtesy and respect to the bar and litigants before the bar.

Mr. BROOKS. They are nice now.

Senator HEFLIN. There are a lot of complaints about them now. I tell you, I hear not only in my State but other places.

Mr. BROOKS. Well, they are nice today. Boy, they are gracious. Butter would melt in their mouths. [Laughter.]

Senator HEFLIN. Thank you. We appreciate you all coming here. We will get to the introductions.

Senator HEFLIN. I would like to ask each of the nominees to come forward, and we will give the oath to everyone at the same time.

If you will raise your right hands, do you solemnly swear that the testimony that you will give at this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge BIERY. I do.

Mr. FURGESON. I do.

Judge GARCIA. I do.

Mr. HANNAH. I do.

Ms. JACK. I do.

Senator HEFLIN. Thank you.

I would like to ask, maybe starting with you, if you would introduce each of the members of your family and friends who are here. I do not want to keep everybody standing. You can go ahead and sit down, and then you follow on.

Ms. JACK. Thank you, Mr. Chairman and Senator Brown. I am pleased to introduce to you my family and friends that are here today, starting with my daughter, Katherine Jack; my husband, William David Jack; my mother, Marian Graham; my brother, Don Graham; one of my best friends from Arizona, Mary Jane Perry; my daughter's friends and our friends, Clarice Ramos and Travis Thomas. The kids started first grade together, and now they live in the general area.

Thank you.

Senator HEFLIN. All right. Judge, if you would introduce the members of your family?

Mr. FURGESON. My name is Royal Furgeson, Mr. Chairman and Mr. Senator. I would like to introduce my wife, Julie; my sister-in-law, Cindy Burnett; my niece, Dee Burnett; and some close family friends, a distinguished Washington lawyer, Bruce Ellison, his wife, Audrey, and their daughter, Jillian.

Senator HEFLIN. Thank you.

All right, sir, if you would?

Judge BIERY. Your Honor, Mr. Chairman, Senator Brown, my name is Fred Biery. It is a pleasure for me to mention, first of all, some people who are not here: our oldest daughter Annalisa is 10 years old and needed to stay in school and get ready for her dance recital, but she is here in spirit. My parents: my father is a practicing lawyer, and so he was not able to be here. But I do have my wife, Marcia, and our youngest daughter, Molly, who is 3 years old.

Senator HEFLIN. Let's look at Molly a little bit here. [Laughter.]

All right. Molly looks like she is all right.

Judge BIERY. And, Your Honor, Mr. Chairman, your comment about judicial temperament, at least in my case, Molly is one of the reasons that always keeps me humble. Thank you.

Senator BROWN. Wait until she is a teenager. [Laughter.]

Judge GARCIA. Senator and Senator Brown, I wish to introduce my parents, Oscar and Rebecca Garcia, from San Diego, TX; one of my best friends and former wife and the mother of my two children, Pat Garcia; my son, a San Antonio Spurs avid fan, Robert Garcia; and Lisa Garcia, one of the prettiest girls in San Antonio; and a cousin of mine, Albert Tobin, who is in the U.S. Navy. And my other two sisters could not be here, Becky and Irma. Oh, and my brother. Excuse me. [Laughter.]

There went my Christmas gift. Oscar Garcia III.

Thank you, Senator.

Mr. HANNAH. Mr. Chairman, Senator Brown, I have with me today my wife, Judge Judith Guthrie—and I am John Hannah—and a friend of mine from Tyler, Bernat Howard.

Senator HEFLIN. Well, thank you. We will go in the order they have here on this list. Judge Biery is first.

Do you have any opening statement or anything you want to say?

Senator BROWN. No.

Senator HEFLIN. I also want to recognize a distinguished Texan who is here, John White, who has been in the administration up here and who has been lobbying for all of you, every one of you, and has already been talking to me about you. So I imagine he has been talking to the President and a few others about you, so we do want to recognize him.

If you would, we are delighted to have you, and we have a few questions. Most of you, I think, realize that when we bring you together and there are more than one, you are in pretty good shape to go through the confirmation process. If you are the only one for a hearing, you might as well expect you are going to have a lot of tough questions asked of you. But, anyway, we will be delighted to go ahead and start now on this.

Judge most of your experience has been in the State court. However, if confirmed, you will be moved from the State to the Federal level and will face a docket that includes not only a heavy criminal caseload but also constitutional, employment, and civil rights cases.

What steps do you plan to take to familiarize yourself with those areas of law in which you may lack experience?

TESTIMONY OF SAMUEL FREDERICK BIERY, JR., SAN ANTONIO, TX, TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TEXAS

Judge BIERY. Mr. Chairman, I have already had the good fortune of being in an orientation course along with my colleagues here in Richmond, VA, that the Federal Judicial Center put on, and I understand that there are other opportunities available to do that, and, of course, studying and reading on my own, and I look forward to those new professional challenges.

Senator HEFLIN. You have been in charge of an alternative dispute resolution program instituted by the appellate court in which a panel of attorneys from various fields of law, following trial but before appeal, seek to assist the parties and the attorneys to reach a settlement. If you are confirmed as a district court judge, would you encourage litigants to participate in alternate dispute resolution?

Judge BIERY. Yes, sir. I have done that in my State trial court as well, and as a practical matter, the size of the dockets require that we find creative ways to move these cases.

Senator HEFLIN. How did this ADR Program work in Texas? And do you think it was a success?

Judge BIERY. It is still in its infancy, but thus far the prognosis is that it has been helpful, both at the trial court level and the appellate court level in moving the caseload and clearing the dockets.

Senator HEFLIN. Senator Brown, do you have some questions?

OPENING STATEMENT OF SENATOR BROWN

Senator BROWN. Thank you.

Judge you have extensive experience at the State level and a variety of other experiences as well. I think that is the kind of background that we like to see in a nominee. Obviously one of the things that is of great concern to the Congress and to the whole country at this point is the explosion of litigation and how it is handled in the courts.

You undoubtedly have had a number of experiences in the State court where you found people nonresponsive to pleadings, who have brought actions that are either frivolous or border on the frivolous. How would you characterize the way you have handled those incidents?

Judge BIERY. I have used the tools available through motions for summary judgment and sanction rules. I think that we always have to be careful to have a balance between getting rid of, in my experience a fairly small percentage, frivolous matters, but on the other hand making sure that the courts are open to legitimate litigation.

Senator BROWN. Have you ever awarded attorney's fees and expenses?

Judge BIERY. Yes, sir.

Senator BROWN. Do you in your own mind feel you can be impartial and fair when you come to political issues that come before the court?

Judge BIERY. Yes, sir. In my 15 years—or now my 16th year—on the State bench, I have had occasion to have issues or cases before me that have some political ramifications, and I have always

thought of my job as a judge to be the umpire and would continue to seek that reasonable balance and give both sides a fair hearing, irrespective of the issues or the parties.

Senator BROWN. Mr. Chairman, I had one other question, but we have run out of time. I was dying to ask what has happened to SMU's football program, but I will not ask that. [Laughter.]

Judge BIERY. Well, Senator, may I also tell you that Molly, my 3-year-old, just got back from her first trip to your State last week and her first experience in the snow, and she enjoyed it very much.

Senator BROWN. We think of ourselves as kind of a colony of Texas. I must tell you that often I have been in rooms where there is only one Texan, and I have felt outnumbered. And I cannot tell you how I feel today.

Senator HEFLIN. Thank you, sir. We appreciate your answers to the questions.

Judge BIERY. Thank you, Mr. Chairman, Senator Brown. [Applause.]

Senator HEFLIN. We will have Mr. Furgeson come forward.

Mr. Furgeson, for many years, you served on the board of the El Paso Legal Assistance Foundation. As you know, every lawyer has the professional obligation to devote part of his or her time to serving the disadvantaged. Various State bars have considered whether there should be a mandatory requirement that all lawyers engage in a certain amount of pro bono work.

In your view, how important is it for an attorney to perform pro bono work?

TESTIMONY OF WILLIAM ROYAL FURGESON, JR., EL PASO, TX, TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TEXAS

Mr. FURGESON. I think it is very important, Mr. Chairman, and I am proud to say that I think the El Paso lawyers have done their fair share of pro bono work through the years.

Senator HEFLIN. Do you think there should be a mandatory requirement that all lawyers engage in pro bono activities, or do you believe that the voluntary system works?

Mr. FURGESON. I believe that the voluntary system works fairly well. In El Paso, we are a city of low-income people, and we have not as many lawyers per capita as other communities do. And we developed a system where we have challenged each other to do pro bono work together, and it has worked well.

Senator HEFLIN. You have been in private practice for how many years?

Mr. FURGESON. Twenty-three years, sir.

Senator HEFLIN. Twenty-three years. What generally has been your practice?

Mr. FURGESON. It has been civil trial work, sir. I began in insurance defense litigations, and I have spent about the last 12 or 15 years trying commercial cases.

Senator HEFLIN. How do you plan to prepare yourself for your transition to the Federal bench where a considerable portion of your caseload will involve criminal issues?

Mr. FURGESON. I have attended, along with my other four nominees here, the Federal Judicial Center's orientation for judges, Mr.

Chairman, and I found that extremely helpful. About half the course was on sentencing issues, and I worked very hard with the rest of my colleagues to get a feel for that. I think I have some work to do, and I plan to work hard. I am fortunate that chief judge of the western district Harry Lee Hudspeth is in my community, an outstanding jurist who knows the criminal law well, and he and I have already had discussions about important criminal law issues that he believes I need to familiarize myself with.

Senator HEFLIN. There has been debate among judges about increased willingness to impose sanctions against lawyers or parties who file frivolous lawsuits. Some lawyers argue that the fear of what is known as rule 11 sanctions have had a chilling effect on them, particularly when they try to make creative arguments in newer, developing areas of the law like civil rights. As one judge once said, "Today's frivolous arguments may be tomorrow's precedents."

What do you think of these concerns, and how might you respond to them in the courtroom?

Mr. FURGESON. Your Honor, Mr. Chairman, in El Paso, and Midland, Odessa, where I may hopefully have the opportunity to work, there are fairly small bars. We all get along very well with each other, and we know each other. I have never asked that a lawyer be sanctioned that has been opposing me, and I have never had a lawyer opposing me ask that I be sanctioned.

I really would see the use of sanctions as having a minimal impact, at least on the courts that I am familiar with. I hope that sanctions can be used sparingly because I believe that courts need to be open. And as you say, sometimes arguments that are on the cutting edge of the law turn out to be the law. So I hope that it will be my practice to use rule 11 sanctions with very little need.

Senator HEFLIN. I recently was in Florida discussing the problems of trials where you have people whose knowledge of the use of the English language is limited, and I suppose in El Paso you may have a similar problem.

How has the Federal court been able to handle this, say with jurors and witnesses and translators and other people? Have you been able to work it where you feel like justice is being rendered to all parties that are involved, including jurors and the parties themselves and others?

Mr. FURGESON. It is a very important issue in my community. As you know, Mr. Chairman, El Paso is on the border with Mexico, and I know Judge Hudspeth has worked very diligently to make sure that our interpreters are very well qualified and are very involved in the process.

We make sure that all defendants, for example, are wired with microphones and the interpreter interprets quietly so that the defendant, if he cannot speak Spanish, can stay abreast with the proceedings, every part of the proceedings. And, of course, those witnesses who cannot speak English, we have outstanding interpreters who work to interpret the proceedings for the jury and the rest of the court.

It is an issue that deserves continued work, but I believe in El Paso, where the need is so great, we are doing a decent job in that area.

Senator HEFLIN. What is the status relative to people serving on juries that may not be able to understand English?

Mr. FURGESON. Mr. Chairman, as I understand the practice in our Federal court, there is a requirement that all jurors be able to speak and understand English. And as I understand the way both our State and Federal court work, if someone is unable to speak and understand English, they are excused from service. I am not for sure if that is going to be the wave of the future.

Senator HEFLIN. How is it handled in the State court? Is it a strike for cause, or is it a peremptory strike?

Mr. FURGESON. No, sir, it is a qualification issue. And in our State courts, every Friday we have a very large panel of 400 or 500 people who come into the State court system, and if a potential juror cannot speak and understand English, they are excused from service at that time. And I understand it is pretty much the same practice in our Federal court.

Senator HEFLIN. Well, does that cause any constitutional problem?

Mr. FURGESON. As far as I know, Mr. Chairman, there has been no constitutional challenge to that practice in either the State or Federal courts in El Paso, and people seem to have grown accustomed to our system.

Senator HEFLIN. All right. Well, thank you, sir. We appreciate your testimony.

Mr. FURGESON. Thank you, Mr. Chairman.

Senator HEFLIN. Judge Garcia, you have been an appellate court judge for the State of Texas for about 2 years. Why do you want to leave the appellate bench and become a Federal district court judge?

TESTIMONY OF ORLANDO LUIS GARCIA, SAN ANTONIO, TX, TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TEXAS

Judge GARCIA. Well, that is a question that several of my colleagues have asked. I think it will give me a different opportunity to serve at the trial level, to serve on the front line, so to speak, of the judiciary. And I am looking forward to doing that, Senator.

Senator HEFLIN. In what ways do you expect sitting on the Federal bench to differ from your experience in the State court?

Judge GARCIA. Well, obviously, an appellate judge merely reads the briefs, listens to arguments of counsel, and issues an opinion, hopefully expounding on the issues before him or her. The trial bench will see witnesses, have hearings. Every case will be case-specific.

Senator HEFLIN. In 1989, you served on the State bar committee considering the Texas disciplinary rules of professional conduct. Would you tell the members of the committee a little about your work on that committee and the conclusions reached by the committee?

Judge GARCIA. That committee served the purpose of reviewing disciplinary procedures from the various grievance committees in Texas. As you know, in Texas we have about 50,000, 60,000 lawyers, about 10 or 12 district grievance committees, and as you can

well imagine, there is a great number of, unfortunately, grievances files.

The process is reviewed to see if it can be made better, more expeditious, and fairer, both to the complainant and to the attorney in question. The committee had made some recommendations to the State bar for its consideration.

Senator HEFLIN. Judge Garcia, you served as a State legislator for many years. While a member of the Texas State Legislature, you were active in revamping the State's criminal justice system through legislation affecting prisons, probation, and parole systems.

As you know, for many years this committee and Congress has been involved with and has worked on legislation relating to prisons, probation, and the parole issues.

Based on your experience with these issues at the State level, can you offer Congress any advice as to how these programs could be revamped to work more effectively?

Judge GARCIA. Well, Senator, in Texas, when we started looking at the corrections system and the parole system and the probation system, the common denominator found in almost every category was that the offender lacked an education, lacked basic support from family, or anyone else. And it seems to me that as far as Texas is concerned—and it is probably true in every State and in the country—if we can reach persons at an early age—that is, have good basic health care, good basic education—it is less likely that that person will have to enter into the criminal justice area and thus cause a burden upon the State and society.

Senator HEFLIN. Well, assuming, though, that that does not occur, do you have any suggestions of whether to abolish parole and whether or not the probation system works. Of course, we now have sentencing guidelines, and a great deal of them take away from the discretion of the judge, but on the other hand, they eliminate some of the problems of disparity in sentencing.

Do you have any suggestions about that? You talked about the root causes, but assuming that the root causes are not solved in the immediate future, do you have any suggestions as to how these systems could operate better or could be restructured?

Judge GARCIA. I think the sentencing guidelines are still in the process of an infancy, a beginning. I think the goal and expectations are very grand and very right and very righteous. I think that on the whole they will work because, indeed, there is probably no reason why an offender in Maryland ought to not be receiving the same penalty as an offender in Colorado or Alabama, especially if he or she committed roughly the same offense with the same consequences.

There are, however, times when some discretion is warranted so that a judge can balance the interests of that particular offender with the interests of society. I think it is early enough that the jury is still out. We must always be mindful of the limited resources that the Federal Government and the States have in terms of incarcerating anyone. At some point, you have to make a decision who and when do you incarcerate.

Senator HEFLIN. Thank you, sir. We appreciate your testimony.

Judge GARCIA. Thank you, Mr. Chairman.

Senator HEFLIN. Judge-to-be, Mr. Hannah, we appreciate you coming forward.

Mr. HANNAH. Good morning, Mr. Chairman.

Senator HEFLIN. You have served as district attorney and as a U.S. attorney for the eastern district of Texas. You worked as a private practitioner. You also served as legal counsel for Common Cause of Texas. Currently in your position as secretary of state of Texas, you interpret the State election code.

In what ways do you think that your experience as a defense counsel, as an advocate, as a prosecutor, and as a public official have prepared you to serve as a judge?

TESTIMONY OF JOHN HENRY HANNAH, JR., TYLER, TX, TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TEXAS

Mr. HANNAH. Well, one thing, Mr. Chairman, I have had the opportunity to appear before multitudes of judges during my career; and as you commented and some of the Congressmen commented, although many of them are, all of them are not princes. I would hope to be able to model myself out of those that are most admired by the bar and the State of Texas.

As you say, I have had a wide experience. I have had the privilege of being a Federal and a State prosecutor for some period of time, and I have also had a large criminal defense practice for a number of years.

Senator HEFLIN. What would you do when faced with a fifth circuit precedent which controlled the matter before you but with which you personally disagreed?

Mr. HANNAH. I would follow the fifth circuit precedent, Mr. Chairman.

Senator HEFLIN. Since the inception, the Federal sentencing guidelines have been the subject of debate. In fact, one district court judge resigned because, according to press accounts, he could no longer follow Federal sentencing guidelines in criminal cases. The press reported that this Federal judge felt that the mandatory guidelines were too harsh and too rigid.

While you were in private practice, you represented many criminal defendants. What are your views on the sentencing guidelines in general and more specifically on whether they unduly limit a trial judge's discretion?

Mr. HANNAH. First of all, Mr. Chairman, let me say that as a Federal judge I can follow the guidelines. That would be my obligation and duty.

I personally think the guidelines work in some cases tremendous injustices, not only for clients that I had that were sentenced under the guidelines but also other injustices that I have read about.

I think in a perfect world all sentencing would be equal, you may have a defendant in Boston and a defendant in Texas that have committed the same crime, but there are going to be so many differences and different ways that they should be treated that the judge should probably have the ability to do that.

I would suggest, if I was going to make the law, that the guidelines be advisory instead of mandatory and that a sharp departure by the judge could be appealed, perhaps, if he did not have good

reasons to depart, but generally let them be advisory, and then judges could know what is happening in other districts.

Senator HEFLIN. I agree with you. I think these things are getting to be a real problem, from what I hear across the country.

Your questionnaire stated that you served on the State Bar of Texas committee on Federal judicial appointments from 1984 to 1987. You have also been a district attorney and a U.S. attorney. Based on your experience from that committee and your experience as a trial attorney, what qualities do you consider important in prospective judicial nominees?

Mr. HANNAH. I think a certain degree of learning, obviously, is necessary and a certain degree of experience is necessary—the more, the better. I think probably the most important characteristic of a trial judge, though, once he has minimum or proper qualifications of experience and education, is character and patience. I know judges that are better judges that are less smart than some that are not so good.

Senator HEFLIN. Congress is contemplating legislation aimed to reduce pervasive overcrowding in the Federal courts by allowing Federal judges to assign some of their smaller cases to court-appointed arbitrators. Many judges and lawyers have expressed concern about this approach, saying it is a question that certainly if there are disincentives in regards to de novo trials, it will impinge upon the constitutional right of a jury trial as well as the constitutional right of access to justice.

During testimony before the courts and administrative practice subcommittee, the American Board of Trial Advocates voiced its objections to this proposal. Given your experience as an active litigator, do you have any thoughts on this proposal?

Mr. HANNAH. My position is about the same as the American Board of Trial Advocates, Mr. Chairman. I do not want to do anything that impedes a person's right under the seventh amendment to have a jury trial. I believe that arbitration and mediation can play a role and help reduce dockets in many courts, but I do not want to see it an impediment, as you mention, to a jury trial.

Senator HEFLIN. Thank you, sir. We appreciate your testimony.

Mr. HANNAH. Thank you, Mr. Chairman.

Senator HEFLIN. Ms. Jack, if you will?

Ms. Jack, in recent years, much has been said about the Federal courts' increased caseloads generally and the resulting problem of docket backlog. This backlog has had an adverse effect on litigants before the courts who have been forced to suffer at least some, if not significant, delay in the resolution of their claims.

If confirmed, what steps would you take to ensure that your docket progresses at as quick a pace as is reasonable and fair?

TESTIMONY OF JANIS ANN GRAHAM JACK, CORPUS CHRISTI, TX, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF TEXAS

Ms. JACK. Mr. Chairman, pursuant to the 1990 Civil Justice Reform Act, my district, the southern district of Texas, was made a pilot district to study cost increases in civil litigation, and justice delayed is, as we know, sometimes justice denied. There was a

committee appointed in the southern district to send out questionnaires to litigants, lawyers, and witnesses.

As a result of the return of those questionnaires, the committee published in 1993, in the late fall, several guidelines, several suggestions, such as early case differentiation and management conferences, increased use of U.S. magistrates.

One of the complaints of the lawyers who wrote back in the questionnaire was delayed rulings by judges, and I would hope—and as a litigator, I have also felt that way, that you must rule promptly. I also favor alternative dispute resolution.

Senator HEFLIN. Your questionnaire states that since 1989 your practice has focused on civil litigation. If confirmed for a position on the Federal bench, you will preside over cases which may include drug trafficking, major Federal and civil rights violations, and constitutional issues. What steps do you plan to take to familiarize yourself with these areas of the law in which you may lack experience?

Ms. JACK. Thank you, Mr. Chairman. Since May, when I was first recommended, I attended a seminar this summer on Federal civil procedure. Second, I chaired as a criminal defense attorney, to bring myself up to speed, a trial that was very complex, money laundering, had some 8,300 form violations, and I felt like I learned a great deal from that experience about Federal criminal law.

I shared with the colleagues the week's experience at the Federal Judicial Center, put on for prospective judges, and half of that was evidentiary matters, civil issues, constitutional issues—I am sorry. Half of that as well, the other half was criminal issues. And I have been in correspondence and received brochures and books and learning materials from the Federal Judicial Center, and I do have work to do. And I have been working all summer and all fall to get up to speed on the issues with which I am not familiar.

Senator HEFLIN. We appreciate your testimony.

Ms. JACK. Thank you, Mr. Chairman.

Senator HEFLIN. We thank you all for your testimony. I assume that most of you, you ought to have fairly smooth sailing, and we hope to be able to go through the confirmation process rapidly and see that you will be on the bench helping to reduce the caseload and trying also to do justice at all times.

We have a statement from Congressman Ortiz on behalf of Ms. Jack, and he speaks very highly of you, and he expresses his regret that he could not be here because of some unexpected business before the House Armed Services Committee. But his statement will be made part of the record.

[The prepared statement of Mr. Ortiz follows:]

PREPARED STATEMENT OF HON. SOLOMON P. ORTIZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. Chairman, distinguished Members of the Judiciary Committee—it is my privilege to introduce to you one of the most competent, qualified and versatile members of the legal community in South Texas.

I am proud to introduce to the Members of this committee, Janis Graham Jack, a nominee for District Judge for the Southern District of Texas.

She is a proud member of our community in Corpus Christi, Texas. As you will hear, her journey to appear before you today has been unconventional indeed.

Before she became a lawyer, she was a nurse and devoted mother.

Jan's commitment and drive are exemplified in her pursuit of a law degree, which she attained while commuting by plane between Corpus Christi and Houston.

Jan has been an important force in bridging the gap between minority communities in Corpus Christi.

She practices family law, which is easily one of the most difficult and demanding specialties of the law to practice.

Thank you for the opportunity to present to you an outstanding candidate for District Judge for the Southern District of Texas.

Senator HEFLIN. If there are other statements that any of the Congressmen from Texas or other people would like to enter into the record, we would be glad to receive them if we receive them within a reasonable time.

Thank you. The hearing is adjourned.

[Whereupon, at 11:55 a.m., the committee was adjourned.]

[Submissions for the record follow:]

SUBMISSIONS FOR THE RECORD

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name: Samuel Frederick Biery, Junior
2. Address: List current place of residence and office address.

208 Village Circle
San Antonio, Texas 78232 (home)

Fourth Court of Appeals
Bexar County Justice Center
San Antonio, Texas 78205 (office)
3. Date and place of birth:

November 11, 1947
McAllen, Texas
4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address.

Married to Marcia Elaine Mattingly Biery

Self-employed
Marketing/advertising
208 Village Circle
San Antonio, Texas 78232
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Texas Lutheran College - Seguin, Texas
1966-1970
B.A. 1970

School of Law
Southern Methodist University - Dallas, Texas
1970-1973
J.D. 1973
6. Employment record: List by year all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions, and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, partner, proprietor, or employee since graduation from college.

1973-1978
Biery, Biery, Davis and Myers, a professional corporation
I was an employee and shareholder engaged in the general practice of law.

1971-present

Board of Regents, Texas Lutheran College

Member and Chair of the Fiscal Affairs/Physical Plant
Committee

No monetary compensation

1979-1982

Judge, County Court at Law Number Two of Bexar County, Texas

1983-1988

Judge, 150th District Court of the State of Texas

1989-present

Justice, Fourth Court of Appeals of the State of Texas

1974-present

Partner in the Biery-Hand and Biery-Francis Joint Ventures
which have as their sole asset a portion of an office building
used by Biery, Biery, Davis and Myers for the practice of law.

1979-present

Partner in the Biery-Bluntzer Joint Venture which involves the
ownership of one rental house in New Braunfels, Texas.

7. Military Service: Have you had any military service? If so,
give particulars, including the dates, branch of service, rank
or rate, serial number and type of discharge received.

Yes. I served in the United States Army reserve from 1970 to
1976. My highest and last rank was E-4, serial number 457-78-
6456, and I was honorably discharged in January, 1976.

8. Honors and awards: List any scholarships, fellowships,
honorary degrees, and honorary society memberships that you
believe would be of interest to the Committee.

Texas Lutheran College:

Varsity basketball scholarship, 1966-1970

Resident assistant scholarship, 1967-1970

Student Body President, 1968-1969, 1969-1970

Distinguished Alumni Award, 1980

Elected member of Board of Regents, 1971-present

School of Law, Southern Methodist University

Hatton W. Sumners Scholar, 1970-1973

Order of the Coif, 1973

Outstanding Young Democrat of Bexar County, 1978

Outstanding Young Lawyer of San Antonio, 1980

9. Bar Associations: List all bar associations, legal or judicial related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

American Bar Association
1973- present

State Bar of Texas
Crime Victim/Witness Compensation Committee, 1988-present
(Vice-chair, 1991-92)

San Antonio Bar Association
President, 1987-88
President-elect, 1986-87
Vice-president, 1985-86
Secretary, 1984-85
Treasurer, 1983-84
Director, 1980-83

San Antonio American Inns of Court
President, 1990-92
Director, (present)

Texas Bar Foundation
Life Fellow

San Antonio Bar Foundation
Director, 1989-present

Mexican-American Bar Association

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

I do not belong to any organizations which are active in lobbying.

Board of Regents - Texas Lutheran College

University United Methodist Church

Big Brothers/Big Sisters - Alamo Area

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such membership lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

All courts of the State of Texas - 1973

United States District Court for the Western District of Texas
- 1974

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues of constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

None

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent; July 26, 1993

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

Judge, County Court at Law Number Two, Bexar County, Texas (1979-1982). Elected. Jurisdiction was misdemeanor criminal, civil up to \$5,000, mental health, and probate.

Judge, 150th State District Court (1983-1988). Elected. Jurisdiction is civil (no limits) and felony criminal.

Justice, Fourth Court of Appeals of the State of Texas (1989-present). Elected. Jurisdiction of civil and criminal appeals from county and district courts in a 32 county region of South Central Texas.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

1. (a) HSAM v. Gatter, 814 S.W.2d 887 (Tex. App.--San Antonio 1991, writ dism'd by agr.).

- (b) Wentworth v. Meyer, 837 S.W.2d 148 (Tex. App.--San Antonio, orig. proceeding)(Biery, J., dissenting), overruled sub nom, 839 S.W.2d 766 (Tex. 1992) (Texas Supreme Court agreed with my dissent.)
- (c) Hurd Enters., Ltd. v. Bruni, 828 S.W.2d 101 (Tex. App.--San Antonio 1992, writ denied).
- (d) Ochs v. Martinez, 789 S.W.2d 949 (Tex. App.--San Antonio 1990, writ denied).
- (e) Daniels v. Pecan Valley Ranch, Inc., 831 S.W.2d 372 (Tex. App.--San Antonio 1992, writ denied), cert. denied, 113 S. Ct. 2944 (1993).
- (f) Apolinar v. Thompson, 844 S.W.2d 262 (Tex. App.--San Antonio 1992, writ denied).
- (g) Greene v. Thiet, 846 S.W.2d 26 (Tex. App.--San Antonio 1993, writ denied).
- (h) Aguilar v. State, 850 S.W.2d 640 (Tex. App.--San Antonio 1993, pet. granted).
- (i) Uribe v. Houston Gen. Ins. Co., 849 S.W.2d 447 (Tex. App.--San Antonio 1993, n.w.h.).
- (j) '21' International Holdings, Inc. v. Westinghouse Elec. Corp., 856 S.W.2d 479 (Tex. App.--San Antonio 1993, n.w.h.).

2. Of my 380 appellate opinions, four have been reversed. Of thousands of trial court decisions rendered in my ten years on the trial bench, nine have been reversed or reversed "in part." I am unaware of any of my decisions or opinions which have been affirmed with significant criticism of my substantive or procedural rulings.

Trial court decisions which were reversed or "reversed in part":

1. La Hacienda Sav. Ass'n v. Houston Gulf Inv. Corp., 759 S.W.2d 195 (Tex. App.--San Antonio 1988, no writ). A company brought action to recover an aircraft and damages. Aircraft buyer, as well as others, counterclaimed for damages alleging breach of contract, fraud, and tortious interference. The buyer sought declaratory judgment it had title to the aircraft. As trial judge, I granted summary judgment for the buyer and the plaintiff/claimant appealed. The San Antonio Court of Appeals reversed and remanded, holding that a genuine issue

of material fact existed as to the buyer's knowledge of the outstanding claim, and that an aircraft buyer is not an ordinary buyer protected by the Texas Business and Commerce Code.

2. Wynne v. Adcock Pipe & Supply, 761 S.W.2d 67 (Tex. App.--San Antonio 1988, writ denied). A pipe supply company brought an action on a sworn account against a drilling company and the drilling company's principal. At the trial level, the company and principal were found jointly and severally liable, and appeal was taken. The San Antonio Court of Appeals affirmed as to the principal's personal liability; reversed and rendered as to the company's liability.
3. Davis v. Grammer, 750 S.W.2d 766 (Tex. 1988). The vendor of real property brought an action against the purchaser for reformation of the deed. Final judgment in favor of the purchaser was entered, and the vendor and her children, who had intervened, appealed. The San Antonio Court of Appeals affirmed in a published opinion, 727 S.W.2d 18 (Tex. App.--San Antonio 1987). The Texas Supreme Court reversed and remanded, holding that the vendor's points of error in the court of appeals preserved the issue of reformation and that the vendor was entitled to reformation of the deed.
4. Employers Casualty Co. v. Block, 744 S.W.2d 940 (Tex. 1988). A roofing contractor with a multiperil insurance policy filed suit against the insurer for breach of the insurance contract. The homeowners, who had obtained a judgment against the contractor, intervened. As trial judge, I granted the homeowners' motion for directed verdict with respect to the insurer's wrongful failure to defend, but granted the insurer's motion for judgment notwithstanding the verdict and rendered a take-nothing judgment against the homeowners, who appealed. A divided San Antonio Court of Appeals reversed and rendered in a published opinion, 723 S.W.2d 173 (Tex. App.--San Antonio 1986), holding that once the issue of wrongful failure to defend was determined against the insurer, the agreed judgment between the insured and the homeowners could not be collaterally attacked. Further, the court of appeals held that the insurer was precluded from contesting liability based upon a coverage question because it failed to affirmatively plead that the damaging event did not occur during the policy. For different reasons

than those expressed by the court of appeals, the Texas Supreme Court affirmed.

5. Home Sav. Ass'n v. Guerra, 733 S.W.2d 134 (Tex. 1987). A consumer brought an action against a seller and assignees of a credit contract to recover for damages as a result of the seller's alleged breach. Judgment was entered in favor of the consumer and the assignee appealed. The San Antonio Court of Appeals, in a published opinion, 720 S.W.2d 636 (Tex. App.--San Antonio 1986), affirmed. The Texas Supreme Court affirmed the trial judgment awarding attorneys fees and declaring the note void. The judgment of the court of appeals holding the assignee jointly and severally liable for the seller's misconduct in excess of the amount paid by the consumer under the contract was reversed.
6. J.P. Building Enters. v. Timberwood Dev. Co., 718 S.W.2d 841 (Tex. App.--Corpus Christi 1986, writ ref'd n.r.e.). Purchasers of real property brought an action against grantors/developers seeking declaration that a warranty deed restrictive covenant did not prohibit subdivision of two tracts of land, injunction and money damages after the grantors/developers notified the purchasers that the subdivision of tracts was prohibited by deed restrictions. Judgment was entered that the deed restrictions precluded the purchasers from subdividing the tracts and the purchasers appealed. The Corpus Christi Court of Appeals reversed and remanded the trial court's order and held: (1) the restrictive covenant was not ambiguous; (2) subdivision of the tracts would not violate the restrictive covenant so long as any building on subdivided land was used solely for residential purposes and was a single family residence of requisite dimensions; and (3) finding as to intent of the developer was improvidently made where the trial court determined as a matter of law that the restrictive covenant was not ambiguous.
7. Patterson v. A.L. Poss & Sons, Inc., 705 S.W.2d 301 (Tex. App.--San Antonio 1986, no writ). A subcontractor brought an action to recover damages for breach of contract and on quantum meruit against the parties with which the subcontractor had contracted. The parties had agreed by subcontract with the general contractor to haul material for a highway construction project. As trial judge, I rendered judgment non obstante

verdicto for the defendants after the jury had awarded the subcontractor damages for both breach of contract and quantum meruit. The subcontractor appealed. The San Antonio Court of Appeals affirmed as to the quantum meruit award. The judgment n.o.v. was reversed and rendered as to the damages awarded under the contract.

8. State v. Coca Cola Bottling Co., 697 S.W.2d 677 (Tex. App.--San Antonio 1985, writ ref'd n.r.e.), appeal dismissed, 748 U.S. 1029 (1986). The State of Texas brought suit to divest a bottling company of acquired assets. As trial judge, I sustained the bottling company's special exception on constitutional grounds and ordered the cause of action dismissed with prejudice. The San Antonio Court of Appeals held that section 15.05(d) of the Texas Free Enterprise and Antitrust Act of 1983 was not unconstitutional under the supremacy or commerce clause and remanded the cause to the trial court.
9. Chasewood Constr. Co. v. Rico, 696 S.W.2d 439 (Tex. App.--San Antonio 1985, writ ref'd n.r.e.). A subcontractor brought suit for damages against a general contractor for breach of two written contracts. The general contractor counterclaimed for breach of contract damages. The subcontractor later amended the action to include claims for defamation growing out of the same transaction. Judgment was entered in favor of the subcontractor on both the defamation and breach of contract counts, and the general contractor appealed. The San Antonio Court of Appeals affirmed the judgment for actual and exemplary damages for defamation; the breach of contract damages award was reversed because the instructions to the jury contained error.

Appellate court decisions which were reversed:

1. Bexar County Sheriff's Civil Serv. Comm'n v. Davis, 775 S.W.2d 807 (Tex. App.--San Antonio 1989), rev'd, 802 S.W.2d 659 (Tex. 1990), cert. denied, 112 S. Ct. 57 (1991). A discharged sheriff's employee brought an action challenging his dismissal. The trial judge affirmed the Bexar County Sheriff's Civil Service Commission's order upholding the employee's dismissal. The San Antonio court of Appeals reversed the judgment of the trial court and remanded to the Commission on the basis that the Commission had violated the

employee's federal procedural due process rights by failing to inform the employee of the names of the witnesses against him. A divided Texas Supreme Court, with four Justices dissenting, reversed.

2. Worthey v. State, 773 S.W.2d 783 (Tex. App.--San Antonio 1989), rev'd, 805 S.W.2d 435 (Tex. Crim. App. 1991). The defendant was convicted of possession of methamphetamine, and she appealed. The San Antonio Court of Appeals reversed, and the State petitioned for discretionary review. The Texas Court of Criminal Appeals reversed, holding that the officer's search, in the course of investigatory stop, for weapons in the interior of the defendant's purse was reasonable.
 3. DeLeon v. Gant, 773 S.W.2d 396 (Tex. App.--San Antonio 1989), rev'd, 786 S.W.2d 259 (Tex. 1990). An appeal was taken from an order of the trial court dismissing the action on limitations grounds. The San Antonio Court of Appeals reversed and remanded. The Texas Supreme Court reversed the judgment of the court of appeals and affirmed the judgment of the trial court, holding that the plaintiffs' unexplained delay in obtaining service on the defendant established the failure to use due diligence as a matter of law.
 4. Almanza v. State, No. 04-91-00148-CR (Tex. App.--San Antonio, September 4, 1991) (not designated for publication), rev'd, 839 S.W.2d 817 (Tex. Crim. App. 1992). The defendant was convicted by the trial court of possession of heroin in an amount less than twenty-eight grams. The defendant appealed, and the San Antonio Court of appeals affirmed the conviction. The Texas Court of Criminal Appeals held that the defendant's unrecorded oral statement was inadmissible, and reversed and remanded the cause to the trial court.
3. Cases involving federal or state constitutional issues:
- (a) Wentworth v. Meyer, 837 S.W.2d 148 (Tex. App.--San Antonio 1992, orig. proceeding) (Biery, J., dissenting), overruled sub nom, 839 S.W.2d 766 (Tex. 1992) (Texas Supreme Court agreed with my dissent).
 - (b) Ochs v. Martinez, 789 S.W.2d 949 (Tex. App.--San Antonio 1990, writ denied).
 - (c) Aguilar v. State, 850 S.W.2d 640 (Tex. App.--San

Antonio 1993, pet. granted).

- (d) State ex rel. Hilbig v. McDonald, 839 S.W.2d 854 (Tex. App.--San Antonio 1992, orig. proceeding).
- (e) Montez v. State, 824 S.W.2d 308 (Tex. App.--San Antonio 1992, no pet. h.).
- (f) Porter v. State, 806 S.W.2d 316 (Tex. App.--San Antonio 1991, no pet.).
- (g) Davis v. Bexar County Sheriff's Civil Serv. Comm'n, 775 S.W.2d 807 (Tex. App.--San Antonio 1989), rev'd, 802 S.W.2d 659 (Tex. 1990), cert. denied, 112 S. Ct. 57 (1991).
- (h) Ortiz v. State, 773 S.W.2d 941 (Tex. App.--San Antonio 1989, pet. ref'd).

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

No public offices other than judicial held.

I was defeated in the 1990 Democratic Primary for the Texas Supreme Court by Gene Kelly, who was eventually defeated by the Republican nominee.

17. Legal Career:

- a. Describe chronologically your law practice and experience after your graduation from law school and until you became a judge, including:

- 1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk.

No.

- 2. whether you practiced alone, and if so, the addresses and dates.

No.

- 3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, the nature of your connection with each, and the names, addresses and

current telephone numbers for individuals who have direct personal knowledge about your work at such law firm, company or governmental agency.

1973-1978

Biery, Biery, Davis & Myers, P.C.

3003 N.W. Loop 410

San Antonio, Texas 78230

Associate and shareholder

(210) 349-3892

- b. 1. What has been the general character of your practice, dividing it into periods with dates if its character has changed over the years?

I practiced law with the firm of Biery, Biery, Davis & Myers from November 1973 to December 1978. I was involved in a general practice which included family law, probate, civil litigation (business, real estate and personal injury), drafting of real estate, business and estate plan documents, and criminal defense.

2. Describe your typical former clients, and mention the areas, if any, in which you specialized.

Legal specialization was beginning to evolve in the mid-1970's. Because I was elected to the bench in November, 1978, I did not pursue any specialization certification during my law practice years.

Typically, my former clients included individuals, families and small businesses such as Moore & Howard Court Reporters, Coaster Plains Company, Joe Ramon and Sons Construction, Lebo Glass Company, Lone Star Ice & Food Stores, Reagan and Company Leasing and Bedell Manufacturing.

- c. 1. Did you appear in court regularly, occasionally or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I appeared in court regularly.

2. What percentage of these appearances was in:

a) Federal courts.	2%
b) State courts of record.	96%
c) Other courts.	2%

3. What percentage of your litigation was:

- a) Civil. 85%
- b) Criminal. 15%

4. State the number of cases you tried to verdict or judgment (rather than settled) in courts of record, indicating whether you were sole counsel, chief counsel, or associate counsel.

Approximately 15 as associate counsel.

Approximately 5 as sole counsel.

5. What percentage of these trials was:

- a) Jury. 20%
- b) Non-jury. 80%

18. Describe ten of the most significant litigated matters which you personally handled and give the citations, if the cases were reported. Give a capsule summary of the substance of each case, and a succinct statement of what you believe to be the particular significance of the case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case a) the dates of the trial period or periods, b) the name of the court and the name of the judge before whom the case was tried, and c) the individual name, address and telephone numbers of co-counsel and of counsel for each of the other parties.

1. I, Terrance Willis (16414 San Pedro, San Antonio, Texas 78232, (210) 496-5609) and Charles Biery (3003 N.W. Loop 410, San Antonio, Texas 78230 (210) 349-3892) represented 125 property owners in the Flying L Ranch litigation in state district court in Bandera Texas and in federal court in San Antonio. The litigation involved breach of contract and truth in lending issues. The cases were of significance to my law practice experience because of the need to learn to manage the flow of a complex case with many parties. I participated in all aspects of pre-trial preparation and trial of the state court case. We lost the breach of contract state cause of action and settled the federal truth in lending action. Opposing counsel was R. Laurence Macon, 300 Convent, Suite 1500, San Antonio, Texas 78205, (210) 270-0810. The state trial judge was Honorable Eugene Williams in about 1976; the judge in the federal case was the Honorable D.W. Suttle in about 1977.
2. Ovalle v. Cuda, 542 S.W.2d 914 (Tex. Civ. App.--Waco 1976, writ ref'd n.r.e.).
Opposing counsel: Damon Ball, 745 E. Mulberry, San Antonio, Texas 78212, (210) 731-6300.

Trial judge: Peter Michael Curry.
 A slip and fall case which I tried, with Samuel F. Biery, Sr., in which I learned the lesson of making sure to put on evidence on each element of the cause of action. We represented Mrs. Ovalle, who broke her leg in a grocery store parking lot. At the close of our case, the trial judge instructed a verdict in favor of the defense because we did not put on sufficient evidence linking the condition of the premises maintained by the store owner to the damage sustained by Mrs. Ovalle. The appellate court affirmed the defense judgment.

3. Sheldon v. Farinacci, 535 S.W.2d 938 (Tex. Civ. App.--San Antonio 1976, no writ).
 Opposing Counsel: James Pearl, 127 E. Travis, San Antonio, Texas 78205, (210) 223-4381
 Trial judge: Fred Shannon
 Priority of and validity of lien case. We represented a judgment creditor seeking to foreclose his judgment lien on real property owned by the judgment debtor. In a summary judgment proceeding, the issue was whether the judgment lien attached to the property before it was conveyed away by the judgment creditor. The trial court granted summary judgment and the appellate court affirmed, holding the deed out of the judgment debtor was adequate and therefore the lien did not attach.
4. Dugie v. Dugie, 511 S.W.2d 623 (Tex. Civ. App.--San Antonio 1974, no writ).
 Opposing counsel: Robert Price, 405 S. Presa, San Antonio, Texas 78205, (210) 227-5311
 Trial judge: Richard Woods
 I represented Mr. Dugie, who had been sued for divorce by Mrs. Dugie. Mrs. Dugie obtained a default divorce decree. We were employed to obtain a reversal of the decree and were successful in doing so based on presenting procedural irregularities in the obtaining of the decree.
5. Torres v. Jarmon, 501 S.W.2d 369 (Tex. Civ. App.--San Antonio 1973, writ ref'd n.r.e.).
 Opposing counsel: Tuck Chapin, 12011 Bammel Lane, San Antonio, Texas 78231, (210) 492-0082
 Trial judge: Jim Onion
 This was my first participation in a significant civil jury trial. I sat second chair to my uncle, Charles E. Biery. The case involved a construction contract and architectural fees. We obtained a judgment n.o.v. and had it upheld on appeal.
6. In about 1974, I was appointed to represent Ms. Amalia Gatica, in an attempted murder case, where she was

accused of shooting her former common law husband as she saw him walking down the street. Although admitting she shot him, her defense was somewhat ahead of its time in that she claimed years of abuse against her by the husband drove her to commit the shooting. The jury found her guilty, but refused to send her to the penitentiary as requested by the assistant district attorney, and assessed probation.

Trial judge: Archie Brown

Assistant District Attorney: Charles Conway

7. Listed below are the names and telephone numbers of other attorneys with whom I had cases during my law practice from 1973 to 1978:

Harry Adams (210) 658-5305

Stephen Allison (210) 978-7000

Sol Casseb III (210) 223-4381

Richard Corrigan (210) 824-9505

Robert Estrada (210) 828-6421

Bill Harris (210) 220-2456

Maury Maverick (210) 826-3805

Dick Ryman (210) 226-0026

Mark Stein (210) 734-7092

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question; please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

During both my law practice and trial judiciary experience, I had the opportunity to help clients, as a lawyer, and parties, as a judge, come to a reasonable agreement concerning their continuing roles and responsibilities as parents, even though they were no longer going to be husband and wife. I viewed those opportunities as a way of being a counselor to the parties and an advocate for the children who often are caught in the middle of these situations.

Although not involving litigation, I also deem significant my involvement with the San Antonio Bar Foundation and its

efforts to educate high school students about the law and ways to resolve disputes peacefully, without violence, and before they result in litigation.

For the past two years, I have been in charge of the alternative dispute resolution program, which our appellate court has instituted. We have a panel of attorneys from various fields of the law who, following a trial and before appeal, seek to assist the parties and their attorneys reach a settlement.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

When I was in private practice, from 1973 to 1978, the law firm of Biery, Biery, Davis and Myers established a deferred compensation profit sharing/retirement plan. When I went on the bench in 1979, I left my share on deposit and it now is worth approximately \$90,000 in certificates of deposit. I cannot draw the funds without penalty until age 59. My plan is to transfer this account into my IRA or some other approved 401(K) program. During my 15 years on the bench, I have not heard any cases in which my former partners in the law firm are involved.

During the past 15 years on the bench, I have earned vested retirement benefits in the Texas and Bexar County retirement systems. I intend to leave these benefits on deposit until I can draw them.

With reference to compensation in the future for any financial or business interest, the only items are a rental house, owned jointly with my sister and brother-in-law, and an interest in the office building where I practiced law. I would receive my share of the proceeds if and when the properties were sold.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

My procedure during the last fifteen years on the bench has been, and will continue, not to hear any cases where my father, uncle or other law partners are involved. If I were to own stock in a company involved in litigation, I would recuse myself. If there was any hint of a conflict, I would disclose it to all counsel and give them the opportunity to ask for recusal, which I would grant voluntarily if requested. I know of no potential conflicts that would arise during my initial service other than if a state court case in which I participated were to find its way to federal court. In that

event, I would not participate in the federal court litigation.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more. (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

Please see attached AO-10.

5. Please complete the attached financial net worth statement in detail (add schedules as called for).

Please see attached net worth statement.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I have never held an official position in a political campaign other than my own judicial races. I have participated in many campaigns for Democratic candidates by way of block walking, yard signs and financial contributions.

AO-10
Rev. 1/93

FINANCIAL DISCLOSURE REPORT

Report Required by the Ethics
Reform Act of 1989, Pub. L. No.
101-594, November 10, 1989
(5 U.S.C.A. App. 6, §§101-112)

1. Person Reporting (Last name, first, middle initial) Biery, Samuel F., Jr.	2. Court or Organization United States District Court for the Western District of Texas (Nominee)	3. Date of Report 11/22/93
4. Title (Article III judges indicate active or senior status; Magistrate judges indicate full- or part-time) Active (Nominee)	5. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date <u>11/19/93</u> ___ Initial ___ Annual ___ Final	6. Reporting Period 1/1/92-11/22/93
7. Chambers or Office Address 4th Court of Appeals Bexar County Justice Center San Antonio, Texas 78205	8. On the basis of the information contained in this Report, it is, in my opinion, in compliance with applicable laws and regulations ___ Reviewing Officer Signature _____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on last page.

I. POSITIONS. (Reporting individual only; see pp. 7-8 of Instructions.)

POSITION

NAME OF ORGANIZATION/ENTITY

☐

NONE (No reportable positions)

Partner _____ Biery-Hand Joint Venture (office building)
 Partner _____ Biery-Francis Joint Venture (office building)
 Partner _____ Biery-Bluntzer Joint Venture (rent house)

II. AGREEMENTS. (Reporting individual only; see p. 8-9 of Instructions.)

DATE

PARTIES AND TERMS

☐

NONE (No reportable agreements)

State and county judicial retirement accounts (vested and will continue in force if I leave the state judiciary); created by Texas statutes.

Biery Law Firm deferred compensation retirement account; 1973-78; agreement with my father and uncle and two law partners; IRS-approved; currently in force

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 9-12 of Instructions.)

DATE

SOURCE AND TYPE

GROSS INCOME

(Honorary only)

(yours, not spouse's)

☐

NONE (No reportable non-investment income)

1 New York Life Insurance policy \$ \$1400(1992-93)
 2 Marcia Mattingly Biery (spouse) 1992-Kathleen Doria \$ _____
 3 Marcia Mattingly Biery (spouse) 1993-self employed \$ _____
 4 State of Texas, County of Bexar - Judicial salary \$ \$93,500/year
 5 \$ _____

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting	Date of Report
Biery, Samuel F., Jr.	11/19/93

IV. REIMBURSEMENTS and GIFTS – transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp.13-15 of Instructions.)

SOURCEDESCRIPTION

☐ NONE (No such reportable reimbursements or gifts)

1	Exempt	
2		
3		
4		
5		
6		
7		
8		

V. OTHER GIFTS. (Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp.15-16 of Instructions.)

SOURCEDESCRIPTIONVALUE

☐ NONE (No such reportable gifts)

1	Exempt	\$
2		\$
3		\$
4		\$

VI. LIABILITIES. (Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp.16-18 of Instructions.)

CREDITORDESCRIPTIONVALUE CODE*

☐ NONE (No reportable liabilities)

1	Biery Retirement Account	I owe myself for a loan taken against my account	K
2			
3	Biery-Bluntzer Joint Venture		
4	owes Troy Nichols a mortgage	loan on rent house	K
5	NY Life Insurance Co.	Loan against my life ins. policy	J
6			
7			

* VALUE CODES: J = \$15,000 or less K = \$15,001 to \$50,000 L = \$50,001 to \$100,000 M = \$100,001 to \$250,000
N = \$250,001 to \$500,000 O = \$500,001 to \$1,000,000 P = More than \$1,000,000

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

Date of Report

Biery, Samuel F., Jr.

11/19/93

VIII. ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate part of Report.)

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C.A. app. 7, § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature _____

Date _____

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C.A. APP. 6, § 104, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Judicial Ethics Committee
Administrative Office of the
United States Courts
Washington, DC 20544

November 23, 1993

Committee on Financial Disclosure
Administrative Office of the United States Courts
One Columbus Circle, N.E., Suite 2-301
Washington, D.C. 20544

RE: Nomination report

Dear Madam or Sir:

On November 19, 1993, President Clinton submitted my name to the Senate for appointment to the United States District Court for the Western District of Texas. I mailed the Financial Disclosure Report to your office on November 22, 1993.

In my haste to comply with the five day time requirement and in making sure I did not overlook any asset reporting, I failed to report my main source of income in Part III (Non-investment Income). Accordingly, I wish to supplement my report which you should receive today with the following information:

III. Non-Investment Income

State of Texas, County of Bexar-judicial salary- \$93,500 per year

I am sending this by facsimile and will mail the original to you. Should you have any questions or need further information about my report, please feel free to call me on my direct line at 210-220-2693.

Sincerely,

FRED BIERY

FINANCIAL STATEMENT

for household of Samuel Frederick Biery, Jr. 457-78-6456
NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			LIABILITIES		
Cash on hand and in banks	1	5,000.00	Notes payable to banks—secured		-0-
U.S. Government securities—add schedule Series E (spouse)	8,000	00	Notes payable to banks—unsecured		-0-
Listed securities—add schedule	-0-		Notes payable to relatives		-0-
Unlisted securities—add schedule	-0-		Notes payable to others		-0-
Accounts and notes receivable:			Accounts and bills due		-0-
Due from relatives and friends	-0-		Unpaid income tax		-0-
Due from others	-0-		Other unpaid tax and interest		-0-
Doubtful	-0-		Real estate mortgages payable—add schedule Home 208 Village Circle	168,000.00	
Real estate owned—add schedule Home 208 Village Circle	250,000.00		Chattel mortgages and other liens payable		
Verstegen note	90,000.00		Other debts—itemize:		
Real estate mortgages receivable	15,000.00		Loan from my law firm ret. acct.		26,000.00
Automobile and other personal property	11,000.00		Loan against life ins. cash value		7,000.00
Cash value—life insurance	14,000.00				
Other assets—itemize: IRA's	20,000.00		Total liabilities	201,000.00	
Former Law Firm retirement acct	90,000.00		Net Worth	427,000.00	
Land/Biery Francis St. Vent.	35,000.00		Total liabilities and net worth	623,000.00	
Biery-Bluntzer Jt. Vent.	5,000.00				
State/county retirement acct	70,000.00				
Total Assets	623,000.00				
CONTINGENT LIABILITIES	-0-		GENERAL INFORMATION		
As endorser, cosigner or guarantor	-0-		Are any assets pledged? (Add schedule.) Home for mortgage		
On leases or contracts	-0-		Are you defendant in any suits or legal actions? No		
Legal Claims	-0-		Have you ever taken bankruptcy? No		
Provision for Federal Income Tax	-0-				
Other special debt	-0-				

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

In addition to activities such as church work, service on the Big Brothers/Big Sisters Board, financial contributions to charity, and working within the Texas Lutheran College Board of Regents to expand scholarship opportunities for minorities, I have on numerous occasions taken time to talk with Boy Scout and Girl Scout troops at the courthouse about our legal system. I wrote a mock trial script which we used for them to participate in and on all of those occasions take the opportunity to encourage them to stay in school and to become involved in our community.

From time to time, I receive calls from lower income people who need guidance and assistance with legal problems. While I am precluded by the Code of Judicial Conduct from giving pro bono legal advice as I did when I was a practicing lawyer, I do lend a listening ear and give guidance about community resources and practicing attorneys who have expertise in the particular field. Through my activity with the San Antonio Bar Foundation, I have helped provide education and information to students, both disadvantaged and advantaged, about our legal system.

In addition to these traditional activities, I received a serendipitous call about eleven years ago concerning a baby who was about to be born to birth parents who were unable to provide much in the way of emotional and financial support, education and other necessities of life. I adopted Anna Lisa when she was a day old and reared her for six years by myself until my remarriage in 1989. In 1990, Marcia and I adopted Molly who was three days old at the time and who was said to be "hard to place" because of her mixed ethnic background. She likewise was born of biological parents who were not able to provide much for her. Anna Lisa is now ten and Molly is three; both are happy, healthy children. The time and energy given to them is far outweighed by the joy we have received.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

No.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

Yes; Senator Krueger formed a diverse committee of lawyers and non-lawyers specifically for the purpose of screening judicial applicants and recommending a "short list" from which Senator Krueger made the final selection.

I first went through a debate with myself, weighing the pros and cons of whether I wanted to leave the state bench after fifteen years of tenure. I ultimately concluded that I did want to seek a new professional challenge and felt that my prior judicial service gave me an opportunity to contribute positively to the federal trial bench in the Western District of Texas, particularly in the moving of the large backlog of cases pending in this district.

I then completed an application provided by then Senator Bentsen and obtained various letters of recommendation. My understanding is that all of this information was transferred to Senator Krueger and the committee. I was subsequently interviewed by the committee, which then provided my name and a few others to Senator Krueger who then made the final recommendation of my name to President Clinton.

Following the recommendation, various sets of forms were sent to me by the White House for completion. These included FBI, Justice Department and American Bar Association questionnaires. I completed the forms, returned them as instructed and was subsequently interviewed, telephonically and in person, by representative of the FBI, ABA and Department of Justice.

On November 19, 1993, I received a call from the General Counsel to the President that President Clinton had forwarded my name to the Senate.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society.
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

In our system of checks and balances and separation of powers, the primary role of the judiciary is to be the fair and impartial umpire in the resolution of civil disputes and in the enforcement of the criminal statutes. On statistically rare occasions, the judiciary is called upon to rule on disputes between the executive branch and the legislative branch or between different levels of government and to decide whether a particular statute violates a constitutional principle. In order to have a predictable and stable "rule of law," the judicial branch should adhere to traditional standards such as stare decisis, standing and ripeness of controversy and generally make only those rulings necessary to resolve the particular dispute before the court.

Subject to constitutional principles, the judiciary should give deference to the will of the people as enunciated by their elected representatives; the judicial branch should act only when there is a clear justiciable controversy based on a complete record developed through the adversarial process and should recognize that the judicial branch is ill-equipped to be an administrator and should attempt to do so only in extreme situations where other institutions clearly refuse to remedy constitutional infirmities.

AFFIDAVIT

I, Samuel Frederick Biery, Jr., do hereby swear that the information provided in this statement is, to the best of my knowledge, true and correct.

DATE: 29/7/5

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

William Royal Furgeson, Jr.

2. Address: List current place of residence and office address(es).

Residence: 3927 Hillcrest, El Paso, TX 79902

Office : 2000 State National Plaza
P. O. Drawer 2800
El Paso, TX 79999-2800

3. Date and place of birth.

December 9, 1941. Lubbock, TX

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Juli Ann Bernat Furgeson, Licensed Psychologist.
Self-employed under Juli Furgeson, Ph.D., 4150 Pinnacle
Street, Suite 100, El Paso, TX 79902-1019.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

- Texas Tech University, Lubbock, TX, 9/60 to 5/64, B.A. English, 5/64.
- University of Texas School of Law, Austin, TX, 9/64 to 5/67, J.D., 5/67.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

- United States Army, 1967-69, Captain, see below.
- County Attorney's Office, Assistant County Attorney, Lubbock, TX, 1969.
- United States District Judge Halbert O. Woodward, Law Clerk, Lubbock, TX, 1969-70.

- Kemp, Smith, Duncan & Hammond, P.C., shareholder, El Paso, TX, 1970-Present.
- Chair, El Paso County Child Welfare Board, 1977-78.
- Chair, El Paso United Way Campaign, 1979.
- President, El Paso United Way, 1981.
- Chair, El Paso Region, National Conference of Christians and Jews, 1980.
- President, El Paso Cancer Treatment Center, 1981-83.
- Chair, El Paso YWCA Capital Campaign, 1986-87.
- President, Keep El Paso Beautiful, Inc, 1989.
- Chair, Council of Judges Policy Advisory Group on Foster Care, 1989-92.
- Chair, Leadership El Paso, Greater El Paso Chamber of Commerce, 1990.
- President, Cathedral High School Parents' Club, 1990-91.
- Chair, Cathedral High School Capital Campaign, 1992.
- Vice-Chair, Administration, Greater El Paso Chamber of Commerce, 1992.
- Member, Cathedral High School Board of Directors, 1989-Present.
- Member, Greater El Paso Chamber of Commerce Board of Directors, 1992-Present.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

7/67 TO 7/69. United States Army. Commissioned as Second Lieutenant in 5/64 upon graduation from Texas Tech University and upon successful completion of R.O.T.C. program. Deferred active duty until graduation from Law School. Attended Adjutant General Officer Basic Training at Ft. Benjamin Harrison, Indianapolis, IN from 7/67 to 9/67. Assigned to Aberdeen Proving Grounds, Aberdeen, MD from 9/67 to 6/68. Assigned to M.A.C.V., Xuan Loc, Long Khanh Province, Republic of South Vietnam from 6/68 to 6/69. Obtained rank of Captain. Received Bronze Star for Meritorious Service and Honorable Discharge in 7/69. Serial number was 458-70-4051.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

- Outstanding Young Lawyer of El Paso, 1973.
- Faculty Award, University of Texas Law School, November, 1983.
- Humanitarian Award, National Jewish Center for Immunology & Respiratory Medicine, May, 1988.
- Hannah G. Solomon Award, El Paso Section, National Council of Jewish Women, February, 1991.
- Community Service Award, University of Texas School of Law, April, 1991.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

- State Bar of Texas, 1969-present.
- American Bar Association, 1970-present.
- El Paso Bar Association, 1970-present.
- Member, Board of Director, El Paso Legal Assistance Society, 1972-78.
- Member, Texas Association of Defense Counsel, 1974-present.
- Chair, State Bar Lawyer Referral Committee, 1977-79.
- President, University of Texas Law School Association, 1978.
- Board Certified, Texas Board of Legal Specialization, Civil Trial Law, 1979-present.
- Chair, State Bar Committee on Alternate Plans to Improve Public Access to Lawyers, 1980-81.
- Fellow, Texas Bar Foundation, 1981-present.
- Fellow, American Bar Foundation, 1993.
- American Judicature Society, 1988-present.
- President, University of Texas Law Review Association, 1982.
- Member, American Law Institute, 1982-present.
- Member, Professional Ethics Committee, State Bar of Texas, 1982-85.
- President, El Paso Bar Association, 1983.
- Chair, State Bar Committee on Liaison with Law Schools and Law Students, 1983-86.
- Fellow, American College of Trial Lawyers, 1987-present.
- Chair, Antitrust and Trade Regulation Section, State Bar of Texas, 1987-88.
- President, West Texas Chapter, Federal Bar Association, 1987.
- President, El Paso Chapter, American Board of Trial Advocates, 1991.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Lobbying:

- Texas Association of Defense Counsel

Others:

- State Bar of Texas
- American Bar Association
- El Paso Bar Association
- Texas Bar Foundation
- American Bar Foundation

- American Judicature Society
- University of Texas Law Review Association
- University of Texas Law School Association
- American Law Institute
- American College of Trial Lawyers
- American Board of Trial Advocates
- Federal Bar Association
- El Paso YMCA
- El Paso YMCA
- Cathedral High School Board of Directors
- Temple Mt. Sinai

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

- Supreme Court of Texas, 1969.
- United States District Court for Western District of Texas, 1971.
- United States Court of Appeals for the Fifth Circuit, 1974.
- United States Supreme Court, 1976.
- United States District Court for the Northern District of Texas, 1990.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

- Note, Oil of Gas, 44 Tex. L. Rev. 1051 (1966) (Tab 1)
- Note, Bankruptcy, 44 Tex. L. Rev. 1364 (1966) (Tab 2)
- Note, Criminal Law, 13 McGill L.J. 663 (1967) (Tab 3)
- Comment, Texas Sentencing Practices, 45 Tex. L. Rev. 471 (1967) (Tab 4)
- Article, The Commerce Test for Jurisdiction under the Sherman Act, 12 Houston L. Rev. 1052 (July 1975) (Tab 5)
- Speaker, State Bar of Texas Litigation Update (RICO Litigation) February 1985 (Tab 6)
- Speaker, State Bar of Texas Art of Persuasion (Final Arguments) May 1989 (Tab 7)
- Speaker, University of Texas Law School 7th Annual Trial Tactics Seminar (Settlement Agreements) December 1989 (Tab 8)

- Speaker, University of Texas Law School 8th Annual Trial Tactics Seminar (Communications Based on Personality Types) November 1990 (Tab 9)
- Speaker, State Bar of Texas 13th Annual Advanced Civil Trial Course (FDIC Litigation) September 1990 (Tab 10)
- Speaker, Texas Judiciary Annual Conference (FDIC Litigation) September 1990 (Tab 11)
- Speaker, State Bar of Texas 14th Annual Advanced Civil Trial Course (FDIC Litigation) September 1991 (Tab 12)
- Speaker, State Bar of Texas 4th Annual Advanced Evidence and Discovery Course (Tort Liability for Discovery Activities) November 1991 (Tab 13)
- Speaker, State Bar of Texas 15th Annual Advanced Civil Trial Course (Litigation Between Business Owners) September 1992 (Tab 14)
- Speaker, State Bar of Texas 5th Annual Advanced Evidence and Discovery Course (Spoliation of Evidence) December 1992 (Tab 15)
- Speaker, State Bar of Texas 16th Annual Advanced Civil Trial Course (Making Evidence Interesting: High Impact/Low Tech), October 1993 (Tab 16)
- Speaker, State Bar of Texas 6th Annual Advanced Evidence and Discovery Course (Making and Meeting Objections Before, During and After the Deposition), November 1993 (Tab 17)
- Chair, Policy Advisory Group on Foster Care, El Paso Council of Judges, Summary Statement, November 1991 (Tab 18)

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. 8/9/93.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

None.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Not applicable.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

None.

17. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:
 1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;
 2. whether you practiced alone, and if so, the addresses and dates;
 3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;
 - Assistant County Attorney, Lubbock County Attorney, Lubbock, Texas from 7/69 to 8/69.
 - Clerked for the Honorable Halbert O. Woodward, United States District Judge for the Northern District of Texas, Lubbock Division from 9/69 to 8/70.
 - Practiced Law with firm of Kemp, Smith, Duncan & Hammond, P.C., P. O. Box 2800, El Paso, TX 79999-2800, from 9/70 to present.
 - I have never practiced law as a solo practitioner.
- b.
 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?
 2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

- My first year at Kemp, Smith involved probate and trust practice; my second year, real estate practice; and my third year until the present, trial practice. My early trial practice involved insurance cases and those gradually changed to commercial cases, which is now what I basically handle.
- Typical clients include banks, closely held and publicly held corporations, farmers and ranchers, utilities, contractors, the FDIC and RTC, and individuals. It has been a varied practice with some specialization in banking law, antitrust law and contract law.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Frequently, to present motions, try both jury and non-jury cases and to argue appeals.

2. What percentage of these appearances was in:
- (a) federal courts;
 - (b) state courts of record;
 - (c) other courts.

- 50% federal courts
- 50% state courts

3. What percentage of your litigation was:
- (a) Civil;
 - (b) Criminal.

- 95% civil
- 5% criminal

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

Approximately 50, almost entirely either as chief counsel or sole counsel

5. What percentage of these trials was:
- (a) Jury;
 - (b) Non-Jury.

- Approximately 30 jury
- Approximately 20 non-jury

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

First Case

- Citation: International Air Industries v. American Excelsior Company, 517 F.2d 714 (5th Cir. 1975).
- Capsule Summary: International Air Industries competed with the American Excelsior Company in the sale of cooler pads in the southwestern United States. Cooler pads are inserted in the four sides of evaporative coolers, which are a cheaper substitute for refrigerated coolers. They work best in dry climates like the desert Southwest. International Air eventually went out of business and then sued American Excelsior, the nation's largest cooler pad manufacturer, in federal court and claimed that American Excelsior priced its product below its costs to drive International Air out of business. American Excelsior denied the allegations and countered that it lowered its prices only to meet competition and that it never dropped its prices below its costs. After a four week trial, the jury found for American Excelsior and rendered a take-nothing verdict against International Air. The trial court's judgment was affirmed on appeal by the Fifth Circuit Court of Appeals. This was the first case in any federal circuit to adopt the Areeda-Turner analysis in regard to predatory pricing in antitrust cases. The analysis is now basically accepted throughout the federal system.
- Party Represented: American Excelsior Company.
- Nature of Participation: At trial, I sat second chair, split the witnesses, prepared all appellate briefs, split the argument in the 5th Circuit and wrote the brief to the U.S. Supreme Court.
- Final Disposition of Case: Jury verdict for American Excelsior affirmed on appeal.
- Date of Representation: Trial was held in 1973.
- Court and Judge: United States District Court for the Western District of Texas, El Paso Division. Judge

Ernest Guinn, deceased. 511 E. San Antonio, El Paso, TX 79901.

- Counsel for Other Parties: Kenneth L. King, Suite 2424, LB 159, 2323 Bryan St., Dallas, TX 75201, 214/220-6300.

Second Case

- Citation: J. T. Yamin v. State National Bank, Cause No. 70-2719 (1976).
- Capsule Summary: Mr. Yamin needed bank financing in his effort to get a bid to purchase surplus government housing. He approached the State National Bank of El Paso for a loan, believed it committed to make a loan, bid on the housing, was awarded the bid and then was told by the bank that they would not make a loan. Mr. Yamin then sued the State National Bank in state court for breaching an agreement to loan him money. He claimed that he told the bank he needed the money if he turned out to be the successful bidder on the government housing and that the bank made a loan commitment to him under such circumstances. He then claimed that the bank reneged on the commitment. The bank denied that it had made any commitment; instead it argued that the discussions about a loan never got past the talking stage. The bank also asserted that it had evidence that Mr. Yamin had backed out of the housing deal because of misrepresentations in the bidding process, not because of the bank's failure to make the loan. After a trial lasting more than a week, a jury found in favor of the bank and rendered a take nothing verdict against Mr. Yamin. No appeal was taken. This was the first "big" case I tried as chief counsel.
- Party Represented: State National Bank.
- Nature of Participation: Chief Counsel.
- Final Disposition: After a six(6) day trial, the jury rendered a verdict for the Bank. No appeal was taken.
- Date of Representation: To the best of my memory, the case was tried in 1976.
- Court and Judge: 41st District Court of El Paso County, Texas. Judge Charles Schulte (Retired), 16000 Glendive, El Paso, TX 79927.
- Counsel for Other Parties: Harold Crowson, Crowson & Ingram, 310 N. Mesa, Suite 706, El Paso, TX 79901, 915/532-3638.

Third Case

- Citation: Gibson Distributing Company, Inc. v. Downtown Development Association of El Paso, 572 S.W.2d 334 (Tex. Sup. Ct. 1978)
- Capsule Summary: For years in El Paso, a group of downtown merchants called the Downtown Development Association brought lawsuits against other merchants to enjoin the violation of the Texas Blue Laws, which

prohibited the sale of certain kinds of merchandise on Sunday. Gibson Distributing Company operated discount stores throughout El Paso and tried to comply with the Blue Laws by roping off sections of its stores on Sunday to exclude the prohibited merchandise from sale. The Downtown Development Association sued Gibson in state court to challenge its compliance with the Blue Laws. In turn, Gibson challenged the constitutionality of the Blue Laws. In a non-jury trial, the court found against Gibson and upheld the constitutionality of the Blue Laws. Gibson instituted a direct appeal to the Texas Supreme Court which also found the Blue Laws to be constitutional.

- Party Represented: Gibson Distributing Company.
- Nature of Participation: Chief Counsel.
- Final Disposition: Gibson Distributing Company failed to overturn the Blue Laws.
- Date of Representation: Trial was held in 1977.
- Court and Judge: 65th District Court of El Paso County, Texas. Judge Eduardo Marquez, Room 906, County Courthouse, 500 E. San Antonio, El Paso, TX 79901.
- Counsel for Other Parties: Frank Feuille, IV, 11th Floor, Texas Commerce Bank Building, 201 E. Main, EL Paso, TX 79901. 915/533-2493.

Fourth Case

- Citation: Tigua General Hospital, Inc. v. Harry Feuerberg, 645 S.W.2d 575 (Tex. Civ. App.--El Paso 1982, no writ).
- Capsule Summary: While Dr. Feuerberg was attempting to renew his staff privileges at Tigua General Hospital, he learned that the Board of Governors was going to deny his application. Before it could do so, he filed suit to enjoin the Board from interfering with his renewal. After a hearing, the trial court granted Dr. Feuerberg's request for a temporary injunction. Upon appeal, the Court of Appeals overturned the injunction and held that physicians in Texas have no cause of action against a private hospital for termination of staff privileges even where the hospital's action might be arbitrary or where common law rights to procedural or substantive due process were violated. In one respect, the case was novel because Dr. Feuerberg, in an attempt to circumvent the case law, argued that he was owed a fiduciary duty by the shareholders and directors of the hospital. The appellate court rejected the argument.
- Party Represented: Tigua General Hospital.
- Nature of Participation: Chief Counsel for Hospital. Worked with other attorneys representing other defendants.
- Final Disposition: Defendants eventually got summary judgment dismissing all claims of Dr. Feuerberg.
- Date of Representation: 1982.

- Court and Judge: 243rd District Court of El Paso County, Texas. Judge Woodrow Bean II, Retired, 1533 Lee Trevino, Suite B, El Paso, TX 79936.
- Counsel for Other Parties: (1) Ray Caballero, 521 Texas Avenue, El Paso, TX 79901. 915/542-4222; (2) Colbert N. Coldwell, The Commons, Suite A-201, 4171 North Mesa, El Paso, TX 79902. 915/544-6646; (3) Malcolm McGregor, 1011 North Mesa, El Paso, TX 79902. 915/544-5230.

Fifth Case

- Citation: C. H. Leavell & Company v. Leavell Co., 676 S.W.2d 693 (Tex. Civ. App.--El Paso 1984).
- Capsule Summary: The Leavell Company was a successful construction company that operated for many years in the western part of the United States. When the owner got to retirement age, he decided to sell his business to the Sarkisian Company, who then changed the name of the business to C. H. Leavell and Company. Sarkisian was an eastern company that wanted to expand to the west. After the sale, the companies got into some arguments and the Leavell Company sued in state court to collect payments allegedly due under the purchase agreement. C. H. Leavell and Company, under the Sarkisian ownership, denied any breach of contract and then claimed wrongdoing on the part of the Leavell Company. After a month-long trial, a jury found for the Leavell Company and awarded damages of almost \$600,000. The judgment was affirmed on appeal. This case represented an early use of broad issue submission in Texas.
- Party Represented: Leavell Co.
- Nature of Participation: Chief Counsel.
- Final Disposition of Case: After jury verdict for Leavell Company was affirmed on appeal, case was settled for sizeable sum.
- Date of Representation: Trial was held in 1979.
- Court and Judge: 171st District Court of El Paso County, Texas. Judge Edwin Berliner, deceased. Room 601, County Courthouse, 500 E. San Antonio, El Paso, TX 79901.
- Counsel for Other Parties: Paul Dudley, Dudley, Dudley & Windle, 2501 North Mesa, Suite 200, El Paso, TX 79902. 915/544-3090.

Sixth Case

- Citation: Cox, Colton, Stoner & Starr v. Deloitte, Haskins & Sells, 672 S.W.2d 282 (Tex. Civ. App.--El Paso 1984, no writ).
- Capsule Summary: Cox, Colton, Stoner and Starr was a local El Paso accounting firm which merged with Deloitte, Haskins and Sells, a national firm. After several years together, the two firms split up and Deloitte, Haskins and Sells agreed to indemnify Cox Colton from any claims arising during the years of the merger. Subsequently,

there was a claim by a valued client of Cox Colton. Cox Colton triggered the indemnity and asked Deloitte, Haskins and Sells to settle the claim. Deloitte, Haskins and Sells said that it would honor the indemnity and defend Cox Colton but that it would not settle. Cox Colton then settled with its client, paid the claim and brought suit in state court against Deloitte, Haskins and Sells, who moved for summary judgment on the basis that it was not required to settle but only defend under the indemnity. The trial court granted the motion, but the Court of Appeals reversed and remanded for a trial. The case was later resolved by settlement between the parties.

- Party Represented: Cox, Colton, Stoner & Starr.
- Nature of Participation: Chief Counsel.
- Final Disposition of Case: Settled after appeal.
- Date of Representation: 1984.
- Court and Judge: 171st District Court of El Paso County, Texas. Judge Edwin Berliner, deceased. Room 601, County Courthouse, 500 E. San Antonio, El Paso, TX 79901.
- Counsel for Other Parties: Don Studdard, 415 North Mesa, El Paso, TX 79901. 915/533-5938.

Seventh Case

- Citation: City National Bank v. FDIC, 907 F.2d 536 (5th Cir. 1990).
- Capsule Summary: Before the First National Bank of Midland was taken over by the FDIC, it was the lead bank in many loan participations with other banks. When the FDIC took over, it became the lead lender in the participated loans. One of the participations was with City National Bank and Texas Bank, who became unhappy with the poor results the FDIC obtained in connection with its management of a difficult loan which included a ranch in New Mexico. Claiming breach of contract, fraud and gross negligence, the two banks sued the FDIC in federal court. The FDIC asserted that it acted appropriately and that the loan was simply destined to result in a loss because it was poorly structured from the inception. After a four-day trial, a jury found the FDIC liable and awarded approximately \$450,000 in damages, even though \$900,000 was requested. The trial court granted a judgment n.o.v. in favor of the FDIC. On appeal, the Fifth Circuit Court of Appeals affirmed in part and reversed in part, reinstating an award of less than \$100,000 for the plaintiff banks under the breach of contract claim.
- Party Represented: FDIC
- Nature of Participation: Chief Counsel. Although I assisted on the appeal, government counsel argued the matter to the Fifth Circuit.

- Final Disposition: Fifth Circuit reversed in part and affirmed in part. Case settled based on appellate decision.
- Date of Representation: 1989.
- Court and Judge: United States District Court for the Western District of Texas, Midland Division. Judge Lucius D. Bunton, 200 E. Wall, Midland, TX 79701.
- Counsel for Other Parties: (1) Mr. Douglas S. Lang, Gardere & Wynne, 717 North Harwood St., Dallas, TX 75201, 214/979-4500; 92) Robert E. Wood, Williford, Collmar & Wood, 1845 Woodall Rogers Fwy, Dallas, TX 75201. 214/871-9091.

Eighth Case

- Citation: Martin v. MBank El Paso, 947 F.2d 1278 (5th Cir. 1991).
- Capsule Summary: Mr. Clark and Mr. Martin were West Virginia businessmen who were interested in unusual investments with the potential of large returns. A business associate located an "attractive" investment relating to trades in foreign currency and asked for seed money of \$100,000. Mr. Clark and Mr. Martin wanted to advance the money, but wanted some safeguards regarding its use, so they told their associate to set up a trust account with a bank for the deposit of the money. He established an account with MBank and Mr. Clark and Mr. Martin wired \$100,000 to the MBank Trust Department. The associate withdrew the money and lost it in another venture. In an effort to recover their money, Mr. Clark and Mr. Martin sued MBank in federal court for fraud, breach of contract, negligence and breach of fiduciary duty. The bank said that the account was not under its control but rather was under the control of the business associate, who as a partner of Mr. Clark and Mr. Martin, was acting in their behalf and could do what he wanted with the money, outside the bank's control. After a week-long trial, a jury found in favor of MBank on all issues. The judgment was affirmed by the Fifth Circuit Court of Appeals. As an aside, MBank El Paso was one of the five MCorp banks that was not closed by the OCC. While negotiations were underway to sell the Bank, this case was tried. A significant, adverse verdict might have closed the Bank.
- Party Represented: MBank El Paso.
- Nature of Participation: I was lead counsel. I worked on the appellate brief and argued the case to the Fifth Circuit.
- Final Disposition of Case. Jury verdict in favor of MBank affirmed on appeal.
- Date of Representation: 1991.
- Court and Judge: United States District Court for the Western District of Texas, El Paso Division. Judge Lucius D. Bunton, 511 E. San Antonio, El Paso, TX 79901.

- Counsel for Other Parties: Gordon Stewart, 2211 E. Missouri, Suite S310, El Paso, TX 79903. 915/532-7200.

Ninth Case

- Citation: Fuentes v. McFadden, 825 S.W.2d 772 (Tex. App.--El Paso 1992).
- Capsule Summary: Mr. Fuentes, a Mexican businessman, wanted to purchase equipment for a bowling alley to be built in Juarez. Mr. McFadden, who was retiring from the bowling business in El Paso, agreed to sell his equipment to Mr. Fuentes. Some misunderstandings arose after the first payment under the contract and Mr. McFadden sued Mr. Fuentes in state court for the balance of the payments. The first trial which resulted in a jury verdict of \$400,000 for Mr. McFadden was reversed on appeal. The second trial also resulted in a jury verdict for Mr. McFadden but damages were set the second time at \$200,000. I took the case over after the first adverse jury verdict. As a breach of contract suit between citizens of Mexico and the United States, the case had international aspects which made it particularly interesting.
- Party Represented: Fuentes
- Nature of Participation: I argued the appeal and then tried the case before a jury after the reversal.
- Final Disposition of Case: My client suffered an adverse result in the retrial, but damages were reduced from \$400,000 to \$200,000.
- Date of Representation: 1992
- Court and Judge: 34th District Court, El Paso County, Texas. Judge Bill Moody, Room 905, 500 E. San Antonio, El Paso, TX 79901.
- Counsel for Other Parties: Ralph Harris, 4100 Rio Bravo, Suite 110, El Paso, TX 79902. 915/532-4931.

Tenth Case

- Citation: MBank v. Sanchez, 35 Tex.Sup.Ct.J. 1010 (1992)
- Capsule Summary: Mr. and Mrs. Sanchez purchased a car and financed the purchase through MBank. They got behind in their payments and, despite requests to pay from the bank, grew more delinquent. The bank hired a wrecker service to repossess the car. Self-help repossession is allowed under the Uniform Commercial Code so long as no breach of the peace occurs. The repossession company found the car in the Sanchez driveway and started towing it away. Before they could leave, however, Mrs. Sanchez jumped in the car and refused to get out. The company then towed the car with Mrs. Sanchez in it to a fenced-in lot guarded by dogs. Mrs. Sanchez was not released from the car until several hours later. When Mr. and Mrs. Sanchez sued the bank in state court, it filed a motion for summary judgment and asserted that it was not

responsible for the negligence of its independent contractors. The trial court agreed and granted judgment for the bank. The Court of Appeals reversed and held against the bank. The Texas Supreme Court affirmed the judgment for Mr. and Mrs. Sanchez. This case changed the law in Texas in connection with self-help repossessions by independent contractors under the Uniform Commercial Code.

- Party Represented: MBank
- Nature of Participation: I briefed and argued the case on appeal to the Texas Supreme Court.
- Final Disposition of Case: I lost the case before the Texas Supreme Court in a 5-4 decision.
- Date of Representation: 1992
- Court and Judge: County Court at Law Number 5. Judge Herb Cooper, 500 E. San Antonio, Room 806, El Paso, TX 79901.
- Counsel for Other Parties: David Arditti, c/o Richard Jaramillo, 1327 North Main, Fort Worth, TX 76106. 817/626-2621.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

Besides my trial and court activities, I have attempted to participate in professional activities to improve the administration of justice, to enhance the bar's service to the public and to raise professional standards. When I was President of the El Paso Bar Association, the Association worked closely with the local Judiciary to consider changes in docket and court management. During my year as President-Elect, the Association developed a pro bono program to assist the local legal aid effort in providing representation for the indigent.

In the community, I joined with other interested people in El Paso to bring single member districts to City-Council representation. Because of the successful implementation of single member districts, El Paso avoided a lawsuit which had been threatened by various community groups. I also chaired an effort (unsuccessfully the first time) to get a bond election passed for a new jail. We eventually got the jail and avoided further litigation over prisoners' rights.

At the State Bar level, I have chaired committees to improve the public's access to lawyers and to coordinate law school projects among the eight law schools in Texas. For three years, I served on the State Bar's Professional Ethics

Committee, trying to assist lawyers in answering ethical dilemmas.

For three years, I chaired a task force appointed by our local state judges to examine the foster care system in El Paso. It was a long and difficult project, but we finally presented a detailed report to the Texas Department of Human Services, recommending substantial changes in the foster care system. Attached at Tab 18 is the summary report presented to the full Board of the Department, who came to El Paso to receive our presentation.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

- I am the owner of a Variable Rate Term Subordinated Note executed by Kemp, Smith, Duncan & Hammond, P.C. The note matures on December 31, 1996, at which time all principal plus interest is due and payable.
- I own 1,000 shares of stock in Kemp, Smith, Duncan & Hammond, P.C. I will sell it back to the firm when I leave.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

In my first three years of service, I plan to recuse myself from any case involving my law firm or involving former clients. That should not pose a hardship on other judges because the dockets in the Western District, El Paso, Midland and Pecos Divisions are predominantly criminal and my law firm and my clients are involved almost entirely in civil matters. As best I can tell, the following are the two major areas where conflicts might arise: (1) cases involving relatives or very close personal friends or (2) cases where my family or I owned any interest in any business. I would recuse myself from such cases. I would also plan to resign from all activities and boards of any kind and to decline any invitation to serve, so that I could minimize conflict problems. I would also follow the dictates of all applicable Codes of Judicial Conduct.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends,

interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

- See Form AO 10, attached at Tab 19.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

See Tab 20.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

- El Paso County Coordinator, Al Gore for President, 1988.
- El Paso County Coordinator, Raul Gonzalez Supreme Court Campaign, 1988.
- El Paso County Campaign Treasurer, Phil Martinez Judicial Campaign, 1990-present.
- Co-Finance Chair, El Paso County, Ann Richards' Campaign for Governor, 1990.
- Co-Finance Chair, Unity '90, El Paso County Democratic Party.
- Co-Finance Chair, Unity '92, El Paso County Democratic Party.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.
 - For three years, from 1989 to 1992, I chaired a task force which studied foster care in El Paso. The children in foster care and their families are almost always disadvantaged, especially economically. The effort took many long hours and the final report is now serving as a blueprint for improving foster care in El Paso and throughout Texas, through the auspices of the Texas Department of Human Resources, which received our report by coming to El Paso for one of their regular meetings. See Tab 18.
 - In 1990, I organized a program in my law firm through the El Paso Independent School District's Partners in Education Program so that volunteer lawyers and staff members could regularly visit Henderson Middle School to work with sixth grade students. Henderson is in one of the very poorest parts of El Paso and the children there are very disadvantaged economically (but not "spiritually"). Our effort has brought us city-wide awards and recognition, but best of all has been the response from the children, who have welcomed us with open arms. The program has just finished its third year and has proved remarkably rewarding and encouraging to teachers, students and volunteers.
 - Over the years, I have also rendered free legal service for charitable organizations like the United Way, the El Paso Cancer Treatment Center and Cathedral High School. I have also rendered free legal services to the indigent and, for six years, I served on the Board of the El Paso Legal Assistance Society, which provides free legal care to the poor. I have not recorded the hours I have spent on such service nor could I give a true estimate.
2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

I have never belonged to such an organization.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

Yes. Senator Bob Krueger formed a committee for the Western District of Texas. I completed a form which had been previously utilized by Senator Bentsen and submitted it for consideration. I was invited to interview before the Committee, which was chaired by Martha Smiley, an Austin attorney. The interview lasted 30 minutes and gave the committee an opportunity to ask me questions about my record and qualifications. Thereafter, in May of 1993, Senator Krueger told me that he would recommend me to President Clinton for a nomination to the federal bench. After I was recommended to President Clinton, I received forms to complete. I submitted the completed forms to the White House and the Justice Department in August of 1993. In September of 1993, I was interviewed by telephone by the Justice Department and interviewed personally by the FBI. I was then given a form to complete for the American Bar Association, which I submitted to their representative in Austin, Texas. In late September, 1993, I was personally interviewed by the representative of the ABA. In early November, 1993, I went to Washington, DC to personally interview with representatives of the Office of Policy Development in the Justice Department. On November 19, 1993, the White House called me and told me that President Clinton had nominated me to be a United States District Judge for the Western District of Texas. Thereafter, I was asked to submit this form to the United States Senate, which I have done.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

I believe that the goal of United States District Judges should be to resolve their cases by deciding the litigants' disputes and by limiting the scope of their decisions to those disputes. Judges should not be legislators. The judicial and legislative processes are very different and judges do not have the resources available to them to fashion broad based remedies to large social issues. That is not to say that a District Judge should be reluctant to follow the law in any particular case simply because the decision could have some impact beyond the facts of the matter. Such cases will normally, however, be few and far between. The true role of the District Bench should be to resolve disputes, not to solve social problems. Therefore, my goal will be to follow precedents and be guided by *stare decisis*.

AD-10
Rev. 1/93

FINANCIAL DISCLOSURE REPORT

 Report Required by the Ethics
 Reform Act of 1989, Pub. L. No.
 101-194, November 30, 1989
 (5 U.S.C.A. App. 5, §§101-112)

1. Person Reporting (Last name, first, middle initial) Furgeson, William Royal Jr.	2. Court or Organization U. S. District Court, Western District of Texas	3. Date of Report Nov. 23, 1993
4. Title (Article III Judges indicate active or senior status; Magistrate Judges indicate full- or part-time) Nominated to be an Article III Judge	5. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date <u>Nov. 19, 1993</u> ___ Initial ___ Annual ___ Final	6. Reporting Period as of Nov. 11,
7. Chambers or Office Address P. O. Drawer 2800 El Paso, TX 79999-2800	8. On the basis of the information contained in this Report, it is, in my opinion, in compliance with applicable laws and regulations ___ Reviewing Officer Signature _____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on last page.

POSITIONS. (Reporting individual only; see pp. 7-8 of Instructions.)

POSITION	NAME OF ORGANIZATION/ENTITY
<input type="checkbox"/> NONE (No reportable positions)	
a) Member, Board of Directors	Cathedral High School, El Paso, Texas
b) Member, Board of Directors	Greater El Paso Chamber of Commerce, El Paso, Texas
c) Member, Board of Directors	Advisory Board, YWCA, El Paso, Texas

AGREEMENTS. (Reporting individual only; see p. 8-9 of Instructions.)

DATE	PARTIES AND TERMS
<input type="checkbox"/> NONE (No reportable agreements)	
a) Variable Rate Term Subordinated Note	Kemp, Smith, Duncan & Hammond, P.C.
obligated to pay me \$42,640 by 12/31/94; b) Stock Purchase Agreement, Kemp, Smith Duncan & Hammond, P.C., when I leave firm, it buys my stock for \$2,000.	

NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 9-12 of Instructions.)

DATE	SOURCE AND TYPE	GROSS INCOME
(Honoraria only)		(yours, not spouse's)
<input type="checkbox"/> NONE (No reportable non-investment income)		
Kemp, Smith, Duncan & Hammond, P.C.	1993 Salary and Bonuses	\$ 177,900
Office of Juli Furgeson, Ph.D.	1993 Salary	\$ 80,000
International Paper Co.	1993 dividends	\$ 226
State National Bank of El Paso	1993 interest	\$ 300 (est.)
		\$

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

Furgeson, William Royal Jr.

Date of Report

Nov. 23, 1945

REIMBURSEMENTS and GIFTS - transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp.13-15 of Instructions.)

SOURCEDESCRIPTION
☐ NONE (No such reportable reimbursements or gifts)

OTHER GIFTS. (Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp.15-16 of Instructions.)

SOURCEDESCRIPTIONVALUE
☐ NONE (No such reportable gifts)

\$

\$

\$

\$

II. LIABILITIES. (Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp.16-18 of Instructions.)

CREDITORDESCRIPTIONVALUE CODE
☐ NONE (No reportable liabilities)

State National Bank of El Paso

Loan

J

* VALUE CODES: J = \$15,000 or less E = \$15,001 to \$50,000 L = \$50,001 to \$100,000 H = \$100,001 to \$250,000
 N = \$250,001 to \$500,000 O = \$500,001 to \$1,000,000 P = More than \$1,000,000

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

Furgeson, William Royal Jr.

Date of Report

Nov. 23, 1999

III. ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate part of Report.)

1. Positions: d) Campaign Treasurer, Judge Phil Martinez Re-Election Campaign

C. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent child had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all information given above (including information pertaining to my spouse and minor or dependent child, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C.A. app. 7, § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature

William Royal Furgeson Jr.Date Nov 23, 1999

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C.A. APP. 6, § 104, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Judicial Ethics Committee
Administrative Office of the
United States Courts
Washington, DC 20544

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	5,000	Notes payable to banks—secured	
U.S. Government securities—add schedule		Notes payable to banks—unsecured	14,000
Listed securities—add schedule "A"	12,075	Notes payable to relatives	86,000
Unlisted securities—add schedule		Notes payable to others	
Accounts and notes receivable:		Accounts and bills due	10,000
Due from relatives and friends		Unpaid income tax	
Due from others		Other unpaid tax and interest	
Doubtful		Real estate mortgages payable—add schedule	
Real estate owned—add schedule "A"	150,000	Chattel mortgages and other loans payable	
Real estate mortgages receivable		Other debts—itemize:	
Autos and other personal property	80,000		
Cash value—life insurance	15,000		
Other assets—itemize:			
See Schedules A, B, C	1,000,668		
		Total liabilities	110,000
		Net worth	1,152,743
Total assets	1,262,743	Total liabilities and net worth	1,262,743
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, cosigner or guarantor	150,000	Are any assets pledged? (Add schedule.)	Hillcrest Home - Sch. A
On leases or contracts		Are you defendant in any suits or legal actions?	No.
Legal claims		Have you ever taken bankruptcy?	No.
Provision for Federal Income Tax			
Other special debt			

U.S. SENATE COMMITTEE ON THE JUDICIARY
QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)
 Orlando Luis Garcia

2. Address: List current place of residence and office address(es).
 (Residence) 3222 Howard, Apt. 402
 San Antonio, Texas 78212
 (Office) 4th Court of Appeals
 Bexar County Justice Center
 San Antonio, Texas 78205

3. Date and place of birth.
 November 18, 1952
 Alice, Jim Wells County, Texas

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).
 Divorced

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.
 University of Texas at Austin; (1971-75); received Bachelor of Arts on May 17, 1975
 University of Texas School of Law; (1975-78); received Doctor of Jurisprudence on May 20, 1978

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.
 1974-1983 - Legislative Aide to Texas State Representative Matt Garcia (now deceased) from Bexar County District 57K and to Texas State Representative

Ernestine Glossbrenner from Jim Wells County District 44.

1983-1991 - State of Texas - House of Representatives, Austin, Texas - Member of the House of Representatives

1978-1985 - Law Office of Matt Garcia, San Antonio, Texas

1985-1990 - Heard, Goggan, Blair & Williams, 10th Floor, Tower Life Building, San Antonio, Texas

1991-Present - State of Texas - 4th Court of Appeals - San Antonio, Texas

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

None

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

HONORS AND AWARDS

6/85 - Bexar County District Attorney Sam Millsap - Award "For Outstanding Service in Support of Law Enforcement".

7/85 - Greater San Antonio Chamber of Commerce - Award "In Appreciation of Outstanding Service in 69th Texas Legislature".

7/85 - Texas Public Employees Association - Honorary Lifetime Membership "In Appreciation for Consistent Service & Dedication to Citizens of the State of Texas & the San Antonio State Chest Hospital".

5/86 - Mark Twain Middle School - Certificate "In Recognition of Active & Cooperative Participation in Mark Twain Middle School".

6/86 - St. Mary's Youth Drop-In Center - Certificate of Merit "In Recognition of Outstanding Services to Youth".

11/86 - University of Texas at San Antonio - Award "In Appreciation for Service to Higher Education".

8/87 - San Antonio Mexican Chamber of Commerce - Award "In Appreciation of Outstanding Service in 70th Texas Legislature".

10/87 - San Antonio State Hospital - Award "In Appreciation for Contribution Toward the Welfare of the Mentally Ill".

10/87 - San Antonio Teachers Council - Certificate "In Appreciation for Help Given to Texas Children & Association Members".

1987 - State Bar of Texas, Family Law Section - Award "Ten Best Legislators of 70th Legislature".

5/88 - River City Business & Professional Women's Club - Certificate "Adopt-A-Legislator Program".

8/88 - State Bar of Texas, Professional Development Program - Certificate of Appreciation "In Recognition of Distinguished Service on the Faculty of the Advanced Family Law Course".

9/88 - Association for Children for Enforcement of Support - Award "For Immediate & Assertive Action at Arlington Public Hearings".

1988 - San Antonio Democratic League - Award "In Special Recognition for Outstanding Service to Democratic Party".

1988 - Society of Professional Journalists Sigma Delta Chi - Paul Busch Award "For Most Cooperative News Source".

88-89 - Communities in Schools - Report Card Award "For Continuing Support to Improve Texas Education".

1/89 - Business & Professional Women's Club of San Antonio - Adoption Decree "Duly Recognized Member of Texas Legislature".

5/89 - Mexican American Legal Defense & Educational Fund - Certificate of Appreciation "In Recognition of Leadership & Dedicated Efforts for Advancement of Mexican Americans in Texas"

6/89 - Texas Public Employees Association - Award "Legislator of the Year".

6/89 - Bexar County Commissioners Court - Proclamation "In Appreciation for Going Above & Beyond the Call of Duty to Assist the County in Pursuing Its Goals".

8/89 - John Traeger, State Representative - Award "Legislator of the Year For Outstanding Public Service & Dedication to Texas Public Employees Association & State Employees".

9/89 - Independent Colleges & Universities of Texas - Award "For Distinguished Service in Support of Independent Higher Education and Tuition Equalization Grant Program".

10/89 - Texas Council on Family Violence - Mary Polk Award "In Recognition of Legislative Leadership in Family Violence Laws".

1989 - San Antonio Democratic League - Award "In Recognition of Outstanding Representation of the People of Texas 70th Legislature".

1989 - University of Texas at San Antonio - Award "On UTSA's 20th Birthday, Thank You for your Support of Higher Education".

4/90 - Texas Alliance for the Mentally Ill - Award "Legislator of the Year".

7/90 - Texas Youth Commission - Award "Outstanding State Representative of the Year".

October 7, 1990

TEXAS POLITICS

Light 8/7/90

San Antonio will miss presence of Garcia in Texas Legislature



State Rep. Orlando Garcia has turned his attention from the legislative arena to the judiciary as he seeks a seat on the 4th Court of Appeals. The San Antonio Democrat has sent a letter to the secretary of state relinquishing his legislative seat, effective at the end of the year.

San Antonio will miss Garcia's talents in the Legislature, where he has been a major force in several important issues since his election in 1983. During the last regular session, the three-term lawmaker was active in revamping the state's criminal justice system through legislation affecting prisons and the probation and parole systems.

Garcia has long been an advocate of open government. He successfully pushed through legislation that allowed greater public access to government records and battled against any efforts to close governmental meetings to the public. Garcia's commitment in this area was demonstrated again during the last regular session when he successfully passed legislation strengthening the Texas Open Records Act.

Garcia has kept a close eye on the needs of San Antonio from his vantage point on two powerful committees - the House Appropriations Committee and the House Higher Education Committee. He actively worked to boost higher education funding for San Antonio and South Texas - a crucial need because of the region's lack of graduate and doctoral programs.

And on another front, Garcia was successful in closing legal loopholes that were hampering prosecution efforts in child abuse cases. All of these accomplishments have earned Garcia the reputation of being a progressive and hard-working legislator.

The most telling sign of Garcia's legislative stint may be the manner in which he met the high standards set by his mentor and District 115 predecessor - the late state Rep. Matt Garcia.

San Antonio will miss Orlando Garcia's presence in the Legislature, but if he continues to apply the same kind of diligence and effort he demonstrated as a legislator, Texas should gain a bright and effective judge.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

State Bar of Texas
Texas Bar Foundation (Life Fellow)
San Antonio Bar Association
Mexican-American Bar Association

In 1989, I served on a State Bar Committee - Texas Disciplinary Rules of Professional Conduct.

Texas Judicial Council (1991 - Present) which reviews methods of improvement in the state judiciary.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

None

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

State of Texas Supreme Court and all other state courts;
November, 1978

Fifth Circuit Court of Appeals; June, 1983

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

"Secrecy in the Courthouse? Sealing Court Records Rule 76a." Advanced Personal Injury Law Course; State Bar of Texas, 1992; Authors: Lloyd Doggett, Orlando Garcia and Bea Ann Smith.

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. Last physical examination was January 27, 1993.

14. Judicial Office: State (chronologically) any judicial offices

you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

Elected Justice, 4th Court of Appeals, term began January 2, 1991; this is an intermediate appellate court that hears appeals, both civil and criminal, except death penalty cases, from the county and district courts from a 32-county area, serving an area of about 1.8 million people.

15. Citations. If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of an citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.
 - (1) (a) Trujillo v. State, 809 S.W.2d 593 (Tex. App.--San Antonio 1991, no writ).
 - (b) Rodriguez v. Rodriguez, 834 S.W.2d 369 (Tex. App.--San Antonio 1992, rev'd 860 S.W.2d 414 (Tex. 1993)).
 - (c) Medina v. State, 828 S.W.2d 268 (Tex. App.-- San Antonio 1992, no writ).
 - (d) State v. Garza, 824 S.W.2d 324 (Tex. App.--San Antonio 1992, no writ).
 - (e) Barnes v. Frost Nat'l Bank, 840 S.W.2d 747 (Tex. App.--San Antonio, n.w.h.).
 - (f) In re Sheppard, 815 S.W.2d 917 (Special Court of Review, Appointed by the Texas Supreme Court 1991, no writ).
 - (g) Walker v. Guadalupe Appraisal Review Board, 846 S.W.2d 14 (Tex. App.--San Antonio 1992, writ denied).
 - (h) Ware v. Ware, 809 S.W. 2d 569 (Tex. App.-- San Antonio 1991, no writ).
 - (i) Zuniga v. State, 811 S.W.2d 177 (Tex. App.--San Antonio 1991, pet. ref'd).
 - (j) Metroplex Erectors & Constr. v. Ray Ellison Homes, Inc., 813 S.W.2d 767 (Tex. App.--San Antonio 1991, no writ).

- (2) I have approximately 175 opinions. Of these, two have been reversed. I am unaware of any of my decisions or opinions which have been affirmed with significant criticism of my substantive or procedural rulings.

The following two cases have been reversed by the Texas Supreme Court:

- (a) Sander v. Orozco, No. 04-90-00269-CV (Tex. App.--San Antonio, June 26, 1991, (not designated for publication), rev'd, 824 S.W.2d (Tex. 1992)).

The Court of Appeals found there was no more than a scintilla of evidence that appellant had arranged a pretended sale of appellee's homestead. The Supreme Court reasoned there was some evidence to support the jury's verdict that there was a pretend sale, thus reversing the judgment of the Court of Appeals.

- (b) City of San Antonio v. Singleton, 853 S.W.2d 51 (Tex. App.--San Antonio 1992, rev'd 860 S.W.2d 414 (Tex. 1993)).

A majority for the Court of Appeals found there was not a prohibition in law which prevented either party from seeking a modification of judgment upon a showing of changed conditions or circumstances. The trial court's modification of judgment was affirmed. The Supreme Court noted that there was no evidence in the record that the conditions affecting the trial court's judgment had changed since the original rendition.

I have had no criminal case reversed by the Texas Court of Criminal Appeals.

- (3) Cases involving federal or state constitutional issues:

- (a) In re Sheppard, 815 S.W.2d 917 (Special Court of Review, Appointed by the Texas Supreme Court 1991, no writ).

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State any unsuccessful candidacies for elective public office.

- (a) Elected as Texas State Representative, District 115, Bexar County, San Antonio, Texas; served from November 22, 1983 through January 1, 1991. I was first elected to the legislature in 1983 and re-elected in 1984, 1986 and 1988, without any Democratic or Republican opposition.

- (b) Appointed by Texas Governor Ann Richards to the Texas Judicial Council, 1991-Present; and to the Texas Punishment Standards Commission 1991-Present.
- (c) I have had no unsuccessful candidacies for elective public office.

17. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:

- 1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

No

- 2. whether you practiced alone, and if so, the addresses and dates;

No

- 3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

Law Offices of Matt Garcia
111 Soledad, Suite 500
San Antonio, Texas 78205
Associate Attorney
November, 1978 - August, 1985

Heard, Goggan, Blair & Williams
10th Floor, Tower Life Building
San Antonio, Texas 78205
Associate Attorney
August, 1985 - December, 1990

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

The general character of the practice consisted of family, probate, and criminal law. However, for five years after I passed the bar in 1978, I served as Chief Administrative Aide to State Representative Matt Garcia (now deceased) in the Texas House

of Representatives which was practically a full time assignment.

In 1983, I was elected to the Texas House of Representatives and served for seven years. Prior to becoming an appellate judge, a significant portion of my legal career was devoted to the legislative process involving the development of the law related to the state criminal procedure code, family code, and government code.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

My typical clients were ordinary middle class or lower economic class individuals with problems related to family, probate or criminal law. Due to my numerous legislative duties and assignments, I was unable to obtain any specialization.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

My appearances in Court varied between regularly and occasionally depending upon the demands of the legislature and various committee assignments.

2. What percentage of these appearances was in:
 - (a) federal courts;
 - (b) state courts of record;
 - (c) other courts.

Other than one appearance before the 5th Circuit Court of Appeals, my appearances were in the state courts of Texas.

3. What percentage of your litigation was:

- (a) civil - 85%
- (b) criminal - 15%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

Although I am not certain of the exact number, I participated in at least 10 trials through verdict as associate counsel.

5. What percentage of these trials was:

- (a) jury - 10%
- (b) non-jury - 90%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case: the date of representation; the name of the court and the name of the judge or judges before whom the case was litigated; and the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

All the following causes were disposed in the Bexar County District Courts, unless otherwise noted.

(a) Date: 1982

Cause No.: 82-CI-09341

Client: Curtis Bell

Style: Ramona Bell v. Curtis Bell

Nature of Case: Defending common law marriage claim; division of property

Opposing counsel: Louis Rosenberg, 322 Martinez, San Antonio, Texas 78205; (210) 225-5454

Participation: Pleadings, research, pre-trial

discovery

Disposition: Settled prior to trial

(b) Date: 1988

Cause No.: 84-CI-19062

Client: Norma Casarez

Style: Phillip Casarez v. Norma Casarez

Nature of Case: Child support claim and modification of visitation rights

Opposing counsel: Dan Carabin, 409 S. Presa St., San Antonio, Texas 78205; (210) 271-7008

Participation: Pleadings, research, trial

Judge: Sid Harle (210) 220-2446

Disposition: Support increased; visitation modified

(c) Date: 1986

Cause No.: 86-CI-04479

Client: Eileen Flume

Style: Eileen Flume v. Richard Flume

Nature of Case: Contested divorce matter and custody

Opposing counsel: Buddy Banack, Jr., 112 E. Pecan, #1100, San Antonio, Texas 78205; (210) 226-3116

Participation: Pleadings, research, pre-trial discovery, trial

Judges: Sol Casseb (210) 223-4381; Raul Rivera (210) 220-2663

Disposition: Client obtained custody and a greater portion of the marital estate

(d) Date: 1986

Cause No.: 86-PA-00506

Client: Meliara Morales

Style: In the Interest of Unborn Child

Nature of Case: Paternity, child support

Opposing counsel: Jerry Simon, 226 S. Flores, San Antonio, Texas 78204; (210) 225-5265

Participation: Pleadings, pre-trial negotiations

Disposition: Paternity and child support established

(e) Date: 1990

Cause No.: 86-CI-17869

Client: Timothy R. Louton

Style: Timothy R. Louton v. Sheryl Louton

Nature of Case: Interstate Custody Dispute

Opposing counsel: Eileen Flume, 12027 San Pedro, San Antonio, Texas 78216; (210) 496-5770

Participation: Pleadings, research, trial

Judge: Andy Mirales (210) 220-2525

Disposition: Temporary custody obtained

(f) Date: 1989

Cause No.: 89-CI-00779

Client: Gerardo Ascencio

Style: Zayda Ascencio v. Gerardo Ascencio

Nature of Case: Contested Divorce

Opposing counsel: Peter Susa, 8000 IH 10 West, #1100, San Antonio, Texas 78230; (210) 341-2020

Participation: Pleadings, research, pre-trial discovery, trial

Judge: John Specia (210) 220-2233

Disposition: Divorce, property division

(g) Date: 1991

Cause No.: 81-CI-14609

Client: Adela Navarro

Style: Adela Navarro v. The Hearst Corporation

Nature of Case: Defamation suit

Opposing counsel: Leo Figueroa, 106 S. St. Mary's St., San Antonio, Texas 78205; (210) 226-4211

Participation: Pleadings, research, summary judgment hearing

Judge: Then District Judge Fred Biery (210) 220-2693

Disposition: Summary Judgment granted to Defendant

(h) Date: 1986

Cause No.: F8612-0309CI; 218th District Court; Frio County, Pearsall, Texas

Client: Danny Garcia and wife

Style: Danny Garcia, et ux. v. Horizon, Inc.

Nature of Case: Suit for Declaratory Relief (Construction of a written instrument)

Opposing counsel: James Sindon, P. O. Box 607, Pearsall, Texas 78061; (210) 334-3687

Participation: Pleadings, research

Disposition: Settled in clients' favor.

(i) Listed below are the names and telephone numbers of other attorneys who appeared before me. (All telephone numbers are in the (210) area code, unless otherwise noted)

Larry Macon	270-0810
Shirley Ehrlich	366-1115
Greg Luna	225-2526
Catherine Stone	366-1500
Wallace Jefferson	246-5627
George Spencer	227-7121
Charles Nicholson	735-2233
Jose Guerrero	299-1119
Thomas Croft	246-5610
Hubert Green	227-8000
Pete Torres	223-1464

Seagal V. Wheatley

227-5000

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

My legislative experience, from 1978 as a legislative aide to 1991 as a legislator, some 13 years, made significant demands upon my legal knowledge and experience. As one of the few lawyers in the Hispanic Caucus in the Texas Legislature, I was often requested to prepare, analyze and debate proposed legislation that had significance to the Hispanic community, particularly in areas related to education and criminal justice. This process required and developed the same advocacy skills used in trial.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive for previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

I will receive state retirement benefits as a result of my legislative and judicial service.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

I will resolve any potential conflict by utilizing the applicable guidelines of the Code of Judicial Conduct and statutory guidelines.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No plans, commitments, or agreements to pursue outside employment during my service on the court.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patent, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

Income derived from my state judicial position:

1992:	\$90,035.00
1993:	93,502.59

I derived no other income from any source in excess of \$500.00. Please see attached AO-10 Financial Disclosure Report.

AO-10
Rev. 1/93

FINANCIAL DISCLOSURE REPORT

Report Required by the Ethics
Reform Act of 1989, Pub. L. No.
101-194, November 30, 1989
(5 U.S.C.A. App. 6, §§101-112)

1. Person Reporting (Last name, first, middle initial) GARCIA, Orlando L.	2. Court or Organization Federal District Court Nominee, Western Dist. of Tx.	3. Date of Report 11/22/93
4. Title (Article III Judges indicate active or senior status; Magistrate Judges indicate full- or part-time) Active - Nominee, District Court	5. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date 11/19/93 ___ Initial ___ Annual ___ Final	6. Reporting Period 01/01/92 - 11/22/93
7. Chambers or Office Address 4th Court of Appeals Bexar County Justice Center San Antonio, Tx. 78205	8. On the basis of the information contained in this Report, it is, in my opinion, in compliance with applicable laws and regulations ___ Reviewing Officer Signature _____	

IMPORTANT NOTES: *The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on last page.*

I. POSITIONS. (Reporting individual only; see pp. 7-8 of Instructions.)

POSITIONNAME OF ORGANIZATION/ENTITY
☒ NONE (No reportable positions)

II. AGREEMENTS. (Reporting individual only; see p. 8-9 of Instructions.)

DATEPARTIES AND TERMS
☐ NONE (No reportable agreements)

State and County Retirement accounts created by Texas law, which when
combined have vested.

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 9-12 of Instructions.)

DATESOURCE AND TYPEGROSS INCOME

(Honoraria only)

(yours, not spouse's)

☐ NONE (No reportable non-investment income)

1	<u>New York Life Insurance Policy</u>	<u>\$1,000.00</u>
2	<u>State and County Salary (per year)</u>	<u>\$93,500.00</u>
3	<u></u>	<u>\$</u>
4	<u></u>	<u>\$</u>
5	<u></u>	<u>\$</u>

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting	Date of Report
Orlando Garcia	11/22/93

IV. REIMBURSEMENTS and GIFTS – transportation, lodging, food, entertainment.
 (Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp.13-15 of Instructions.)

SOURCEDESCRIPTION

☐ **NONE** (No such reportable reimbursements or gifts)

1	<u>EXEMPT</u>	
2		
3		
4		
5		
6		
7		
8		

V. OTHER GIFTS. (Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp.15-16 of Instructions.)

SOURCEDESCRIPTIONVALUE

☐ **NONE** (No such reportable gifts)

1	<u>EXEMPT</u>	\$
2		\$
3		\$
4		\$

VI. LIABILITIES. (Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp.16-18 of Instructions.)

CREDITORDESCRIPTIONVALUE CODE*

☐ **NONE** (No reportable liabilities)

1	<u>New York Life Insurance/ loan against cash value</u>	<u>J</u>
2		
3		
4		
5		
6		
7		

* VALUE CODES: J = \$15,000 or less H = \$15,001 to \$50,000 L = \$50,001 to \$100,000 M = \$100,001 to \$250,000
 N = \$250,001 to \$500,000 O = \$500,001 to \$1,000,000 P = More than \$1,000,000

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

Orlando Garcia

Date of Report

11/22/93

VII. INVESTMENTS and TRUSTS – income, value, transactions. (Includes those of spouse and dependent children; see pp. 18-27 of Instructions.)

A. Description of Assets (including trust assets) Indicate, where applicable, owner of the asset by using the parenthetical (S) for joint ownership of reporting individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child. Place "(X)" after each asset exempt from prior disclosure.	B. Income during reporting period	C. Gross value at end of reporting period		D. Transactions during reporting period						
		(1)	(2)	(1)	(2)	If not exempt from disclosure				
		Asset Code (A-E)	Type (e.g., div., rent or int.)	Value Code (J-P)	Value Method Code (Q-V)	Type (e.g., buy, sell, margin, redemption)	Date: Month/Day	Value Code (J-P)	Gain/Loss Code (A-B)	Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)						EXEMPT				
1 New York Life Ins.	B	Int.	K	T						
2 State & County Judicial Salary	G	Salary	M	T						
3 IRA – Frost Bank (San Antonio)	A	Int.	J	T						
4 Frost Bank Checking (San Antonio)	A	Int.	J	T						
5 State Legislative, Judicial, County Retirement Accts.	B	Int.	K	T						
6										
7										
8										
9										
10										
11										
12										
13										
14										
15										
16										
17										
18										
19										
20										

1 Income/Gain Codes: (See Col. B1 & D4)	A=\$1,000 or less E=\$15,001 to \$50,000	B=\$1,001 to \$2,500 F=\$50,001 to \$100,000	C=\$2,501 to 5,000 G=\$100,001 to \$1,000,000	D=\$5,001 to \$15,000 H=More than \$1,000,000
2 Value Codes: (See Col. C1 & D1)	J=\$15,000 or less N=\$250,001 to \$500,000	K=\$15,001 to \$50,000 O=\$500,001 to \$1,000,000	L=\$50,001 to \$100,000 P=More than \$1,000,000	M=\$100,001 to \$250,000 Q=More than \$250,000
3 Value Method Codes: (See Col. C2)	Q=Appraisal U=Book Value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

Date of Report

Orlando Garcia

11/22/93

VIII. ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate part of Report.)

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C.A. app. 7, § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature

Orlando L. Garcia

Date

11/23/93

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C.A. APP. 6, § 104, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Judicial Ethics Committee
Administrative Office of the
United States Courts
Washington, DC 20544

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

Please see attached Financial Statement - Net Worth.

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			LIABILITIES		
Cash on hand and in banks	1,000	00	Notes payable to banks—secured	9,000	00
U.S. Government securities—add schedule	None		Notes payable to banks—unsecured	None	
Listed securities—add schedule	None		Notes payable to relatives	None	
Unlisted securities—add schedule	None		Notes payable to others	None	
Accounts and notes receivable:			Accounts and bills due	1,000	00
Due from relatives and friends	None		Unpaid income tax	None	
Due from others	None		Other unpaid tax and interest	None	
Doubtful	None		Real estate mortgages payable—add schedule	None	
Real estate owned—add schedule	None		Chattel mortgages and other liens payable		
Real estate mortgages receivable	None		Other debts—itemize:		
Autos and other personal property	27,000	00			
Cash value—life insurance			Loan against cash value from New York Life Insurance policy	10,000	00
Other assets—itemize:					
1/2 interest in a \$19,000 IRA; public retirement benefits	9,500	00			
	25,000	00	Total liabilities	19,000	00
			Net worth	60,500	00
Total assets	79,500	00	Total liabilities and net worth	79,500	00
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, cosigner or guarantor	None		Are any assets pledged? (Add where applicable.)	No	
On leases or contracts	None		Are you defendant in any suits or legal actions?	No	
Legal Claims	None		Have you ever taken bankruptcy?	No	
Provision for Federal Income Tax	None				
Other special debt	None				

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

In 1982 and 1988, I served as U.S. Senator Lloyd Bentsen's Bexar County Campaign Manager, and I participated in my own campaigns, as well as campaigns of other Democratic candidates.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I have represented clients, especially in the family law area, at no fee or reduced fee. I have participated in the San Antonio Pro Bono Project on occasion.

I represented neighborhood groups before regulatory bodies concerning their opposition to drinking establishments or halfway houses near schools.

In 1978, I was appointed as LULAC counsel for the 15th District, composed of Bexar County and rural counties surrounding San Antonio. I gave counsel to the District on legal matters.

Since 1980, I have contributed many hours, in excess of 500 hours, to the San Antonio State Hospital Volunteer Council, a support group for the mentally ill by serving on their executive committee, fundraising and speaking assignments.

And, as a legislator representing a dominant minority district, I came to assist numerous constituents with their legal problems by referring them to appropriate resources.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

I do not belong to any organization that discriminates, nor have I ever belonged to any such organization or group.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

Yes. I was interviewed by a committee of lawyers and non-

lawyers formed by former Senator Krueger to screen all potential judicial candidates. After responding to a lengthy questionnaire and interview I was selected by former Senator Krueger.

Following his selection, I completed several forms sent by the White House. These included the FBI, Justice Department, and the American Bar Association. I was later interviewed by representatives of the FBI, the Justice Department, and the American Bar Association.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? if so, please explain fully.

No

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Suffice to say that I view the Judge's role as

applying the law, as written by the legislative body, and following established precedent to the facts of the case to those parties who have proper standing in seeking judicial relief.

I do not advocate the Court's intervention in any matter unless the parties have proper standing.

I believe my experience in the legislative field affords me ample opportunity to separate and distinguish between the three branches of government.

AFFIDAVIT

I, ORLANDO LUIS GARCIA, do swear that the information provided in this statement is, to the best of my knowledge true and accurate.

DATE_____
ORLANDO L. GARCIA

STATE OF TEXAS *

COUNTY OF BEXAR *

SWORN TO AND SUBSCRIBED before me by ORLANDO LUIS GARCIA on
the _____ day of _____, 1993.

NOTARY PUBLIC

**QUESTIONNAIRE FOR JUDICIAL NOMINATION
UNITED STATES SENATE COMMITTEE ON THE JUDICIARY**

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

JOHN HENRY HANNAH, JR.

2. Address: List current place of residence and office address(es).

OFFICE: Texas State Capitol
P. O. Box 12697
Austin, Texas 78711

HOME: 423 S. Chilton
Tyler, Texas 75702

3. Date and place of birth.

June 30, 1939 - Nacogdoches County, Texas

4. Marital Status: (including maiden name of wife, or husband's name).
List spouse's occupation, employer's name and business address(es).

Married to Judith K. Guthrie, a federal magistrate judge.
Courthouse address is 211 W. Ferguson St., Tyler, Texas 75702.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Sam Houston University, Huntsville, Texas; 1/62 - 1/66
B.S. Government and History; 24 hours advanced studies
History and English; Dean's List Student; Academic Honor
Society; Teaching Fellow/Graduate Student

South Texas School of Law, Houston, Texas; attended from
2/68 to 1/69 and again from 8/70 to 12/70.

University of Houston School of Law, Houston, Texas,
attended from 9/69 to 12/70.

(Took Bar exam in January of 1971 before graduating from
law school).

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

1/67 - 1/73 - Member House of Representatives, Texas.

4/71 - 1/73 - Solo private practice of law; Lufkin, Texas.

1/73 - 1/75 - District Attorney for Angelina County, Texas;
Lufkin, Texas.

1/75 - 9/75 - Legal Counsel for Common Cause; Austin, Texas.

- 9/75 - 8/77 - Two to four partner private practice; Lufkin, Texas. Hannah & Welch.
- 8/77 - 8/81 - United States Attorney for the Eastern District of Texas, Tyler, Texas.
- 8/81 - 1/91 - Solo or one partner private practice; Tyler, Texas. John Hannah Law Office.
- 1/91 - present - Texas Secretary of State, Austin, Texas.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

Served in the United States Navy from January, 1958 until December, 1961 as Petty Officer 3rd Class. Serial number 522 95 37. Honorable discharge.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the committee.

Graduate Teaching Fellow (History Department)
Sam Houston State University - 1/65 to 1/66

Pi Gamma Mu - National Social Science Honor Society - 1965

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Texas District and County Attorneys Association.
Texas Trial Lawyers Association - (former member)

Texas Criminal Defense Lawyers Association - (presently a member; member of Board of Directors 1988-1990).

American Board of Trial Advocates - (presently a member).

State Bar of Texas - (presently a member)

State Bar Committees served on:

- Code of Professional Responsibility - 6/1/83 to 5/31/84
- Federal Judiciary Appointments - 6/1/84 to 5/31/87
- Model Rules of Professional Conduct - 6/1/85 to 5/31/86
(Sub-committee chairman)
- Federal Judiciary Relations - 6/1/84 to 5/31/87
- Liaison with the Federal Judiciary - 6/1/91 - 5/31/92
- Penal Code and Criminal Procedure - 6/1/92 to 5/31/93

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Texas Criminal Defense Lawyers Association
(An organization that lobbies)

American Board of Trial Advocates
(An organization that lobbies)

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

All courts State of Texas - 4/71

U.S. District Court, Eastern District of Texas - 3/74

U.S. District Court, Western District of Texas - 4/85

U.S. District Court, Southern District of Texas - App. 1983

U.S. District Court, Northern District of Texas - 2/84

United States Court of Appeals, Fifth Circuit - 10/81

United States Court of Appeals, Eleventh Circuit - 10/81

Supreme Court of the United States - 4/16/80

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

None are available. I have given many speeches as a legislator and Secretary of State. These were given either extemporaneously or with few notes. I have given no speeches involving Constitutional law or legal policy.

13. Health: What is the present state of your health? List the date of your last physical examination.

Good - Had a physical on July 20, 1993.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

Have held no judicial offices.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of

the opinions.

Have never been a judge.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.
- a. Elected State Representative, District 5, State of Texas and served three consecutive terms from 1967 until 1973.
 - b. Elected Angelina County District Attorney, Lufkin, Texas, and served from 1973 until 1975.
 - c. Appointed United States Attorney for the Eastern District of Texas and served from 1977 until 1981.
 - d. Ran unsuccessfully for Texas Attorney General in the Democratic Primary of 1982; lost in the runoff election.
 - e. Appointed Secretary of State of Texas in January, 1991. I presently hold that office.

17. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:
 - 1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

I never clerked for a judge.

2. whether you practiced alone, and if so, the addresses and dates;

1971-1973: Practiced alone in Lufkin, Texas, in Caulder Square, 75901.

1981-1983: Practiced alone in Tyler, Texas, at two locations; 101 W. Front St., Tyler, 75702 and 423 S. Chilton, Tyler, Texas 75702.

1986-1991: Practiced alone at 423 S. Chilton, Tyler, Texas 75702.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

1/73 - 1/75: District Attorney for Angelina County, Texas; was the state's prosecutor.
Address: Angelina County Courthouse, Lufkin, TX 75901

1/75 - 9/75: Served as legal counsel for Common Cause of Texas.
Address: 1615 Guadalupe St., Austin, TX 78701

8/77 - 8/81: Served as United States Attorney for the Eastern District of Texas. Represented the federal government in civil and criminal cases.
Address: 100 College St., Suite 500, Tyler, TX 75710

1/91 - present: Secretary of State, Texas.
Address: P. O. Box 12697, Austin, TX 78711

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

-- I began the practice of law in 1971 as a small town (Lufkin, Texas) solo practitioner: deeds, wills, notes, small civil cases and misdemeanor and felony criminal cases.

-- From 1973 until 1975, I served as the District Attorney for Angelina County, Texas (Lufkin), prosecuting all the state's felony cases. This involved numerous trials ranging from murder to theft.

-- From January of 1975 until September of 1975, I served as legal counsel for Common Cause of Texas. This was primarily a position that reviewed bills in the legislature dealing with "open government" issues and to lobby the legislature to prevent weakening of the reform bills that had been passed the previous legislative session. It also included drafting and working with the legislature to establish our first Public Utility Commission.

-- From September of 1975 until August of 1977, I again practiced law in Lufkin, Texas in a partnership that grew from 2 to 4 lawyers. This was a practice that did everything a small town lawyer is expected to do.

-- From August, 1977 until August, 1981, I served as the United States Attorney for the Eastern District of Texas, supervising the trial and appellate work of 10 lawyers and supportive staff. I tried numerous felony cases personally ranging from R.I.C.O. cases to murder at a Federal institution. I argued at least 2 cases before the Fifth Circuit during this period.

-- From August, 1981 until December, 1981, I served as a Special Assistant United States Attorney for the new U. S. Attorney while I was in private practice to

prosecute (successfully) several R.I.C.O. public corruption cases that had been indicted during my tenure in office.

-- From August, 1981 until January, 1991, I was in the private practice of law. About 5 of those years, I had an associate and the rest was as a solo practitioner. The greatest part of my practice was Federal trial work. I defended in several multi-month R.I.C.O. cases and tried several 1983 Civil Rights Cases both as a plaintiff attorney and as an attorney for the defendant. I also represented the defendant in two state court murder cases, one involving the death penalty. I represented several public officials accused of criminal activity during this period, some of them involved trials. I tried several other cases during this period involving everything from arson to Federal Anti-Trust litigation, both civil and criminal.

-- From January, 1991 until the present, I have served as the Secretary of State of the State of Texas. Part of the job includes interpreting and opining on the State Election Code.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

-- As a new attorney, my typical former clients were average working folks with problems who wanted divorces, deeds, wills, corporate charters, and representation in civil and criminal litigation.

-- Following that, my client was the State of Texas as a state prosecutor and later the United States, in both civil and criminal matters, as United States Attorney.

-- During the last 10 years of practice my typical client has been a citizen accused of a "white collar" crime or occasionally a violent crime.

The greater part of my practice in the last 10 years has been federal litigation. The greater part of that has involved the federal criminal or civil rights statutes.

-- During the last three years as the Secretary of State, I have only appeared in Court twice as a private practitioner, once representing a defendant in a federal civil rights case and once representing a plaintiff in a federal civil rights case.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I appeared in court frequently.

2. What percentage of these appearances was in:
- (a) federal courts --- approximately 80%
 - (b) state courts of record; --- approximately 20%
 - (c) other courts. --- none.
3. What percentage of your litigation was:
- (a) civil; --- 20%
 - (b) criminal. --- 80%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

Approximately 50 cases. Chief counsel or sole counsel in probably 45 cases.

5. What percentage of these trials was:

- (a) jury - 80%
- (b) non-jury - 20%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

First Case

State of Texas v. Terry McMahan and Kathryn McMahan, No. 1-88-53; tried in July, 1989, 241st Judicial District Court, Smith County, Texas, Honorable Joe Tunnell presided. F.R. "Buck" Files, 109 W. Ferguson St., Tyler, Texas 75702 (903) 595-3573, represented Terry McMahan and I represented Kathryn McMahan. We were both

court appointed. The State of Texas was represented by Smith County District Attorney Jack Skeen, Smith County Courthouse, Tyler, Texas 75702 (903/535-0250) and his staff.

This was a capital murder case, the State seeking the death penalty. The trial lasted 6 weeks and ended in a hung jury -- 11 to 1 for acquittal. The defendants were released and the case has never been retried.

Second Case

U.S.A. v. Franklin D. Schmick, et al; No. CR-3-88-077-R; United States District Court, Northern District of Texas; tried in November, 1988, before the Honorable Jerry Buchmeyer. The United States was represented by Assistant U. S. Attorney Mark McBride, 1100 Commerce Street, Room 16G28, Dallas, Texas 75242 (214/767-0969). This was a multi-defendant case. I represented defendant Marshall Mitchell. The following are co-counsel: Richard Anderson, 2828 Routh St., Suite 850, Dallas, Texas 75201 (214/871-1133); Kent A. Schaffer, 600 Travis St., Suite 3000, Houston, Texas 77002; (713/228-8500); Ronald L. Goranson, 2515 McKinney Ave., Suite 1500, Dallas, Texas 75201; (214/651-1121); Bill Wischkaemper, 806 Main St., Lubbock, Texas 79401; (806/763-4568); Mike McCullough, 1700 Pacific Ave., Suite 3300, Dallas, Texas 75201; (214/969-1700).

The government prosecuted the Bandido Motorcycle Gang for conspiracy to blow up (and did blow up) the Banshee Motorcycle Gang. There were 20 plus defendants. The trial lasted over a month. This was one of the largest criminal cases ever tried in the Northern District of Texas. My client was convicted and sentenced to six (6) months.

Third Case

U.S.A. v. Tom Welch; No. TY-79-29-CR; United States District Court, Eastern District of Texas. The Honorable William M. Steger, 211 W. Ferguson St., Tyler, Texas 75702 presided. This case was tried in 1979.

As United States Attorney, I prosecuted the case. The defendant was represented by John Smith, P. O. Drawer 2072, Longview, Texas 75606 (903/757-4001) and Dale Long, 522 S. Spring Ave., Tyler, Texas 75702 (903/592-1641).

This case is reported in 656 F.2d 1039 (1981). It was one of the first prosecutions in the nation under the R.I.C.O. Statute. The trial lasted several weeks. A guilty verdict was returned and upheld on appeal. I wrote the brief for the United States and argued the case before the United States Court of Appeals, Fifth Circuit.

Fourth case

U.S.A. v. George Clark, et al; No. L-86-7-CR. A 1986 case tried in the United States District Court, Eastern District of Texas. The Honorable William M. Steger, 211 W. Ferguson St., Tyler, Texas 75702 ~~presided~~

This was a multi-defendant anti-trust case. The United States was represented by Leonard Senerote, Antitrust Division, Department of Justice, Dallas Office, Dallas, Texas. I represented defendants James Heffernan and Hurley Brown. Other defendants were represented by Jeff Baynham, 120 S. Broadway, Tyler, Texas 75702 (903/592-5510); Woodrow Roark, 223 E. Elm St., Tyler, Texas 75702 (903/597-9348).

This was a price fixing case brought against East Texas beer retailers by the Antitrust Division of the Justice Department. The trial lasted two weeks. All defendants were acquitted. I was lead counsel for the defense.

Fifth Case

U.S.A. v. William S. Fredeman, Sr., et al; No. 1:86CR10, In the United States District Court for the Eastern District of Texas. The Honorable Sam B. Hall, 100 E. Houston St., Marshall, Texas 75670 presided.

This was a multi-defendant R.I.C.O. case filed in 1986. It took approximately six months to try it.

I represented Randy Draper, Virgil Parker and Billy Splettstosser. I was able to get Randy Draper and Virgil Parker severed from the case prior to trial and was able to get Billy Splettstosser dismissed from the case approximately 8 weeks into the trial.

The United States was represented by United States Attorney Bob Wortham and several of his assistants. Their address is 700 North St., Suite 102, Beaumont, Texas 77701 (409/839-2538).

Sixth Case

State of Texas v. Page Perry; Cause No. 12,728, In the 217th District Court of Angelina County, Texas. Presiding judge was Judge David Wilson, 215 E. Lufkin Ave., Lufkin, Texas 75901. The case was tried from June 30, 1986 to July 3, 1986.

The defendant was charged with first degree murder. The defendant and his wife were in a local bar when defendant and his wife's boyfriend got into an argument. Defendant left the club, drove home and got his shotgun, returned to the club and called the boyfriend outside where he shot him.

I was chief counsel and my co-counsel was Roger Moss, 115 W. Shepherd, Lufkin, Texas 75901 (409/639-6501). The State was represented by District Attorney Gerald Goodwin (now District Judge Gerald Goodwin, 215 E. Lufkin Ave., Lufkin, Texas 75901 (409/639-3913).

The jury found the defendant guilty and sentenced him to 5 years in the Texas Department of Corrections.

Seventh Case

Jerry Gene Allen v. City of Lufkin, Texas, et al; No. B-84-555-CA, In the United States District Court, Eastern District of Texas, Honorable Earl Hines, 234 Jack Brooks Federal Bldg., Beaumont, Texas 77701.

This was an excessive force case against The City of Lufkin and their police officers. The plaintiff was shot during an arrest. It was a civil case and the jury rendered a verdict of nothing for the plaintiff.

I represented defendant Officer Gary Spencer. Other co-counsel were Robert Flournoy, 118 South Second, Lufkin, Texas 75901 (409/639-4466); and Scott Taylor, 207 E. Frank St., Lufkin, Texas 75901 (409/634-7666). Plaintiff was represented by Stephen M. Rienstra of Beaumont, now deceased.

Eighth Case

Janice Higgenbotham v. Nacogdoches County, Texas, Victor Bobo, Doug Martin and John Lightfoot; Civil No. L-82-108-CA, In the United States District Court, Eastern District of Texas. The case was assigned to United States District Judge William Justice who referred it to Magistrate Harry W. McKee, Beaumont (now sitting in Tyler, 211 W. Ferguson St., Tyler, Texas 75702, for an evidentiary hearing.

The plaintiff filed this case in August, 1982, alleging she was subjected to sexual misconduct during her tenure as an inmate in the Nacogdoches County Jail.

Plaintiff was represented by Curtis Stuckey, P. O. Box 631902, Nacogdoches, Texas 75963 (409/560-6020). I was retained by Nacogdoches County to defend this case and represented the defendants at the trial which ended on December 19, 1983, with a jury finding for the County.

Ninth Case

United States v. Joe Nichols Luce; No. TX-86-6-CR, In the United States District Court, Eastern District of Texas. This was a 1986 case tried in Texarkana, Texas before the Honorable Sam B. Hall, 100 E. Houston St., Marshall, Texas 75670.

I represented the defendant and the government was represented by AUSA Jeffrey Strand, 110 N. College, Suite 700, Tyler, Texas 75702 (903/597-8146).

The defendant was accused of directing a large car theft ring involved in interstate transportation of stolen property. He was acquitted.

Tenth Case

U.S.A. v. Houston Stuckey and Kirk Pate; No. 5:78 CR10; In the United States District Court, Eastern District of Texas. This case was tried before the Honorable William M. Steger, 211 W. Ferguson St., Tyler, Texas 75702 (903/593-0276). It was tried in Texarkana, Texas, in 1978.

As United States Attorney, I prosecuted the defendants. Defendants were represented by Nicholas H. Patton, 4122 Texas Blvd., Texarkana, Ark. 75504 (501/744-3206) and Norman Russell, 1710 Moores Lane, Texarkana, Texas 75575 (903/792-8246).

This was a murder in a federal correction institution. The defendants were found guilty.

19. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).
1. **State of Texas v. Carl Parker**, September, 1984, Jefferson County, Texas. State Senator Carl Parker was indicted by a State Grand Jury for Promotion of Prostitution, Perjury and other illegal activities. I was retained as co-counsel. The motions and hearings in this case went on for over a year. We were able to get the indictments quashed on two occasions for illegality or misconduct. The State would raise the ante, charging higher crimes such as narcotics trafficking. The

maneuvers that went on almost daily for over a year resulted in a 3rd grand jury no billing Senator Parker and several of the investigating officers resigned or were indicted. He was innocent.

2. As the Chief Election Officer of the State, we are almost daily interpreting the State Election Code for election officials and candidates at all levels of government in Texas. We respond in letter memorandums or official Secretary of State Opinions. I review all the letters and/or memorandums drafted by my staff. I participate personally in some and draft Official Secretary of State Opinions.
3. I have argued 3 cases before the United States Court of Appeals, Fifth Circuit. I have been successful all three times, twice as a prosecutor and once as a criminal defense attorney.
- 4(a) I was appointed by the President of the State Bar to serve on a select committee to bring the Texas rules of lawyer professional conduct in line with the Model Rules of Professional Conduct. I served for approximately a year on this committee and was a sub-committee chairman dealing with one section of the Model Rules. This activity involved numerous hearings and conferences with other committee members. After I completed my sub-committee report, I had to resign because of my law practice. The Model Rules of Professional Conduct were adopted in Texas with few changes.
- 4(b) I was appointed by the State Bar President to serve on the Penal Code and Criminal Procedure Revision Committee from June, 1992 until May, 1993. This involved working with both criminal defense lawyers, state prosecutors and state judges to, among other things, bring the Codes in line with recent state and federal judicial decisions.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

1. Employees Retirement System of Texas - If I retire from State in first quarter of 1994, I will receive monthly benefits in the amount of \$2,200.00.

2. IRA - Citizens State Bank, Tyler, Texas, with a current balance of \$3,658.55.

3. IRA (2) - Tyler Bank & Trust, Tyler, Texas, with a current balance of \$6,491.07.

4. Rent Income: House located at 202 Mockingbird, Tyler, Texas, currently rented at \$500.00 per month (\$250.00 - John Hannah; (\$250.00 - Judith Guthrie).

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

I believe there are few or no categories of litigation or financial arrangements that I have that are likely to present conflicts of interest during my initial service.

In resolving any potential conflicts of interest, I would consult the Federal Canons pertaining to ethical conduct as well as consult with other federal judges in my district.

I, of course, would recuse myself at the slightest possibility of a potential conflict of interest.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500.00 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See attached copy of A.O. 10.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

Attached.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Active in the Ann Richards for Governor Campaign of 1990, but I enjoyed no position.

Active in Secretary of Treasury Bentsen's last Senate election. I enjoyed no position.

I have contributed to scores of candidates both local, state and national.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

For over 50% of the time during private practice from 1981 to 1991, my office was listed as volunteer attorneys for the Womens Advocacy Project out of Austin, Texas. We were a 1-800 number that could be called to give advice for women concerning credit, buying property in own name, employment discrimination matters, etc. Calls were regular! No attempt was made to keep time.

As Secretary of State, I have made a major effort to involve younger citizens in the electoral process. I have given numerous speeches all over the State in regard to this program and have instituted two special projects; Project V.O.T.E. and High School Senior Registration Day.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

No

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

There was. Senator Krueger selected a committee of 15 leading lawyers and several laypersons to serve as a selection committee in the Eastern District of Texas. I notified Senator Krueger of my interest and I filled out a form similar to this one. I was later notified that the committee was meeting. I appeared along with twenty or so others to be interviewed. I was later notified that I was judged number one by the committee and later by Senator Krueger.

I have completed forms for the American Bar Association and the Federal Bureau of Investigation and have been interviewed by both.

I was interviewed by a committee of several Justice Department lawyers in Washington, D.C. on October 13, 1993.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic

criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

I believe an unelected, lifetime appointed Federal Judge limited necessarily to a unique method of receiving information is located in a position particularly ill suited for problem solving rather than grievance resolution. Actions by federal judges that result in far reaching orders extending to broad classes of individuals or impose broad affirmative duties upon governments and society should indeed be Extraordinary Remedies.

Upon a finding of serious unconstitutionality in a system or institution it would be far more appropriate in a democratic government for the judiciary to point to the unconstitutional action and allow a proper period

of time, depending on the circumstances, for elected officials to remedy the problem.

Only in a highly critical situation in which no remedy is going to be forthcoming should a federal judge resort to extraordinary remedies that impose far reaching orders and broad affirmative duties on other branches or levels of government.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks		20	750.	Notes payable to banks—secured	NONE		
U.S. Government securities—add schedule	NONE			Notes payable to banks—unsecured	NONE		
Listed securities—add schedule	NONE			Notes payable to relatives	NONE		
Unlisted securities—add schedule	NONE			Notes payable to others	NONE		
Accounts and notes receivable:	NONE			Accounts and bills due	NONE		
Due from relatives and friends	NONE			Unpaid income tax	NONE		
Due from others	NONE			Other unpaid tax and interest	NONE		
Doubtful				Real estate mortgages payable—add schedule		81	450.
Real estate owned—add schedule		246	500	Chattel mortgages and other liens payable	NONE		
Real estate mortgages receivable	NONE			Other debts—itemize:	NONE		
Automobile and other personal property		20	000				
Cash value—life insurance	NONE						
Other assets—itemize:	NONE						
				Total liabilities		81	450.
				Net Worth		205	800.
Total Assets				Total liabilities and net worth		287	250.
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, cosigner or guarantor	NONE			Are any assets pledged? (Add schedule.)	NO		
On leases or contracts	NONE			Are you defendant in any suits or legal actions?	NO		
Legal Claims	NONE			Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax	NONE						
Other special debt	NONE						

FINANCIAL STATEMENT**Real Estate****Real Estate Owned****Real Estate Mortgage Payable**

1.	423 S. Chilton Tyler, Texas	\$200,000.	Dr. Walter Kerr Tyler, Texas	71,450.
2.	(1/2 int) in 202 Mockingbird Tyler, Texas	37,500.	First Federal S & L Tyler, Texas	3,500.
3.	(1/4 int) in 20 acres, Edom, Texas	9,000.	Jasper Savings & Loan Jasper, Texas	6,500.
		\$246,500.		81,450

FINANCIAL STATEMENT
JUDITH K. GUTHRIE
JULY 20, 1993

ASSETS

Real Property

Rent house at 223 W. Charnwood, Tyler, TX	Value (est) \$	82,000
Rent house at 202 Mockingbird, Tyler, TX	50% int	37,500
20 acres of rural land, Edom, TX	25% int	9,000

Money in the Bank

Tyler Bank & Trust (checking and money market)	15,352
Tyler Bank & Trust (IRA)	3,694
Paine Webber (IRA)	5,445
U.S. Government (Thrift Savings Plan)	26,687

Securities

Less than 4 shares each of the following companies:

Intl Game Technology
Motorola
Nat'l Fuel Gas Co
Telefonos de Mexico
Phillip Morris

Total	594
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Notes Receivable

McAfee Consolidated, Mesa, Arizona	81,609
Joe Hart, Columbia, S.C.	5,000

Vehicles

1991 Buick Regal	8,000
1984 Ford Ranger Pickup	1,500

TOTAL	276,381
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LIABILITIES

Mortgages on Real Property

America's Mortgage Servicing, Inc. (Charnwood)	32,854
First Federal S&L (Mockingbird)	6,500
Tyler Bank & Trust (Edom)	3,200

Consumer Debt

Credit cards	11,725
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Loans

Lamar Bank, Beaumont (car loan)	4,850
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TOTAL	59,129
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NET WORTH	217,252
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INCOME STATEMENT
JUDITH K. GUTHRIE
1990, 1991 and 1992

1990

Salary from the U.S. Courts	\$86,583
Interest earned on money market fund	2,991
Interest paid on note receivable-- McAfee Consolidated, Mesa, Ariz.	<u>10,881</u>
TOTAL	\$ 100,455

1991

Salary from the U.S. Courts	112,907
Interest earned on money market	1,711
Interest paid on McAfee note	4,080
Capital gain from Eagle Investments (a limited partnership put together by my brother in Mesa, Az to buy and sell land for development)	<u>5,693</u>
TOTAL	\$ 124,391

1992

Salary from the U.S. Courts	118,802
Interest earned on money market	1,194
Interest paid on McAfee note	8,160
Interest paid by Joe Hart	<u>225</u>
TOTAL	\$ 128,381

AO-10
Rev. 1/93

FINANCIAL DISCLOSURE REPORT

Report Required by the Ethics
Reform Act of 1989, Pub. L. No.
101-194, November 30, 1989
(5 U.S.C.A. App. C, §§101-112)

1. Person Reporting (Last name, first, middle initial) HANNAH, JOHN H., JR.	2. Court or Organization U.S. DISTRICT; E.D. TEXAS	3. Date of Report 11/23/93
4. Title (Article III Judges indicate active or senior status; Magistrate Judges indicate full- or part-time) U.S. DISTRICT JUDGE	5. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date _____ <input checked="" type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final	6. Reporting Period 1/93 - 11/23/93
7. Chambers or Office Address (Current Address) P.O. Box 12697, Austin, TX 78711	8. On the basis of the information contained in this Report, it is, in my opinion, in compliance with applicable laws and regulations _____ Reviewing Officer Signature _____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on last page.

I. POSITIONS. (Reporting individual only; see pp. 7-8 of Instructions.)

POSITIONNAME OF ORGANIZATION/ENTITY☒ X

NONE (No reportable positions)

II. AGREEMENTS. (Reporting individual only; see p. 8-9 of Instructions.)

DATEPARTIES AND TERMS☒ X

NONE (No reportable agreements)

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 9-12 of Instructions.)

DATESOURCE AND TYPEGROSS INCOME

(Honoraria only)

(yours, not spouse's)

☐

NONE (No reportable non-investment income)

1	1/1/93 - 11/1/93	State of Texas - Salary as Secretary of State	\$ 69,163.87
2			\$
3			\$
4			\$
5			\$

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

JOHN H. HANNAH, JR.

Date of Report

11/23/93

IV. REIMBURSEMENTS and GIFTS — transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp.13-15 of Instructions.)

SOURCEDESCRIPTION☒ NONE (No such reportable reimbursements or gifts)

1	EXEMPT	
2		
3		
4		
5		
6		
7		
8		

V. OTHER GIFTS. (Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp.15-16 of Instructions.)

SOURCEDESCRIPTIONVALUE☒ NONE (No such reportable gifts)

1	EXEMPT	\$
2		\$
3		\$
4		\$

VI. LIABILITIES. (Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp.16-18 of Instructions.)

CREDITORDESCRIPTIONVALUE CODE*☐ NONE (No reportable liabilities)

1	1st Federal S & L, Tyler, TX (J)	Mortgage on 202 Mockingbird, Tyler, TX	J
2	Jasper S & L, Jasper, TX (J)	Mortgage on 20 ac., Van Zandt Co., TX	J
3	East TX S & L, Tyler, TX (S)	Mortgage on Charnwood St., Tyler, TX	K
4			
5			
6			
7			

* VALUE CODES: J = \$15,000 or less K = \$15,001 to \$50,000 L = \$50,001 to \$100,000 M = \$100,001 to \$250,000
 N = \$250,001 to \$500,000 O = \$500,001 to \$1,000,000 P = More than \$1,000,000

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

JOHN H. HANNAH, JR.

Date of Report

11/23/93

VII. INVESTMENTS and TRUSTS - income, value, transactions. (Includes those of spouse and dependent children; see pp. 18-27 of Instructions.)

A. Description of Assets (including trust assets) Indicate, where applicable, owner of the asset. If using the parenthetical (S) for joint ownership of reportable individual and spouse, (S) for separate ownership by spouse, (DC) for ownership by dependent child. Place "(1)" after each asset exempt from prior disclosure.	B. Income during reporting period		C. Gross Value at end of reporting period		D. Transactions during reporting period				
	(1) Act. Code (A-E)	(2) Type (Div., Rent, Int., etc.)	(1) Value Code (A-F)	(2) Value Method Code (G-W)	(1) Type (Buy, Sell, etc., reclassification)	If not exempt from disclosure			
					(2) Date: Month/Day	(3) Value: Code (A-F)	(4) Gain: Code (A-E)	(5) Identify if Private Transaction	
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)									
1 20 ac. land, Edom, TX (J)	A	None	L	W					
2 House (Mockingbird, Tyler, TX (J))	D	Rent	L	W					
3 House (Charnwood, Tyler, TX (S))	C	Rent	L	W					
4 Note, McAtee Consol., Mesa, AZ (S)	D	Int.	L	U					
5 Acct. Tyler Bank, Tyler, TX (S)	B	Int.	K	T					
6 Acct. Southside Bank, Tyler, TX (S)	A	Int.	K	T					
7 Acct. Paine Webber, Tyler, TX (S)	A	Div.	J	T					
8 Acct. Tyler Bank, Tyler, TX	A	Int.	J	T					
9 Acct. Citizens State Bank, Tyler, TX	A	Int.	J	T					
10 Acct. Bank One, Austin, TX	A	Int.	J	T					
11 United Credit Union, Tyler, TX	A	Int.	J	T					
12									
13									
14									
15									
16									
17									
18									
19									
20									

1 Income/Gain Codes: (See Col. B1 & B2) A-\$1,000 or less B-\$1,001 to \$2,500 C-\$2,501 to \$5,000 D-\$5,001 to \$15,000 E-more than \$15,000	2 Value Codes: (See Col. C1 & C2) A-\$10,000 or less B-\$10,001 to \$25,000 C-\$25,001 to \$50,000 D-\$50,001 to \$100,000 E-\$100,001 to \$250,000 F-\$250,001 to \$500,000 G-\$500,001 to \$1,000,000 H-\$1,000,001 to \$2,500,000 I-more than \$2,500,000	3 Value Method Codes: (See Col. C3) A-Appraisal B-Cost (real estate only) C-Other D-Book Value E-Other F-Other G-Other H-Other I-Other J-Other K-Other L-Other M-Other N-Other O-Other P-Other Q-Other R-Other S-Other T-Other U-Other V-Other W-Other X-Other Y-Other Z-Other	4 Transaction Codes: (See Col. D1 & D2) A-Buy B-Sell C-Exchange D-Transfer E-Other F-Other G-Other H-Other I-Other J-Other K-Other L-Other M-Other N-Other O-Other P-Other Q-Other R-Other S-Other T-Other U-Other V-Other W-Other X-Other Y-Other Z-Other
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FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

JOHN H. HANNAH, JR.

Date of Report

11/23/93

VIII. ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate part of Report.)

NONE

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C.A. app. 7, § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature

John Hannah Jr.

Date 11/23/93

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C.A. APP. 6, § 104, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Judicial Ethics Committee
Administrative Office of the
United States Courts
Washington, DC 20544

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

Janis Ann Graham Jack (nickname "Jan")

2. Address: List current place of residence and office address(es).

Residence: 249 Cape Henry, Corpus Christi, Texas 78412
Office: 1650 Texas Commerce Plaza, Corpus Christi,
Texas 78470

3. Date and place of birth.

May 28, 1946, Los Angeles, California

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

William David Jack, II, cardiologist; senior partner in Cardiology Associates of Corpus Christi, 1521 S. Staples, Suite 704, Corpus Christi, Texas 78404

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Texas Christian University summer school 1964

Towson State University spring 1967

University of Tennessee [Nashville Extension] fall 1967 through spring 1968

Old Dominion University, Norfolk, Virginia, fall 1969 through spring 1971 (part time, two years of Spanish)

University of Baltimore 1973 through May 1974 (B.A. in Sociology)

South Texas College of Law January 1979 through May 1981; J.D.

*Though more of a trade school, registered nurse diploma St. Thomas School of Nursing, Nashville, Tennessee, May, 1969; also attended Johns Hopkins Hospital School of Nursing, a diploma school from September 1964 until resignation in fall of 1966

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

After graduating from college in May, 1974, I was employed in the following manner:

1. Received real estate license sometime in 1975 or 1976 and placed with Tompkins Young Real Estate until 1977;
2. Real estate license placed with Robert S. Morgan from 1978 until expiration sometime after receipt of law license in May, 1981; worked part time up until 1980 when I ceased any real estate activity;
3. Shareholder with some other law students and a law professor in a restaurant and bar in Houston, Texas, called the White Horse for possibly a 9 month period beginning in 1980 to spring, 1981; may have been an officer of the corporation for a very short period of time;
4. Sole proprietorship law practice of Janis Graham Jack from August, 1981 to the present.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

None.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Order of the Lytae (South Texas College of Law Honor Society)
 American Jurisprudence Award for Evidence (Spring 1980)
 American Jurisprudence Award for Family Law (Summer 1979)
 American Jurisprudence Award for Criminal Law II (Spring 1980)
 American Jurisprudence Award for Real Property II (Fall 1979)
 Graduated summa cum laude, second in class, South Texas
 College of Law 1981
 Board Certified - Family Law, Texas Board of Legal
 Specialization - 1986; recertified 1991
 Certified as mediator in the State of Texas
 by Attorney-Mediators Institute - 1992

Commended by Corpus Christi YWCA in 1983 for outstanding support of programs for women and girls
 Phi Alpha Delta Law Fraternity International 1981 Award for Outstanding Scholastic Achievement for Sam Houston Chapter

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Past member of Association of Trial Lawyers of America
 American Bar Association
 (Family Law Section)
 (Criminal Justice Section)
 Texas Bar Foundation
 State Bar of Texas
 (Family Law Section)
 (Past Council member, Women and the Law Section)
 College of the State Bar of Texas
 Texas Academy of Family Law Specialists
 Corpus Christi Bar Association
 (C.L.E. Committee)
 (Past member, Medical-Legal Committee)
 (Course Director 1990 Family Law Seminar)
 Past member, Corpus Christi Family Law Association
 (treasurer Nov. 1991 - June 1992)

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

(a) Lobbying Organizations.

League of Women Voters (resigned Nov. 19, 1993)
 South Texans for Choice (resigned Nov. 19, 1993)

(b) All Other Organizations.

Phi Alpha Delta Law Fraternity International
 Texas Medical Association Auxiliary
 Nueces County Medical Association Auxiliary
 Coastal Bend Council for the Deaf
 (resigned Nov. 19, 1993)
 Art Museum of South Texas
 Texas State Aquarium
 Leadership Corpus Christi Alumni
 Planned Parenthood of South Texas
 (resigned Nov. 19, 1993)

(c) Club Memberships

Nueces Club

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

The Supreme Court of the State of Texas -

May, 1981 to present

United States District Court, Southern District of Texas -

Nov. 23, 1981 to present

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

(a) "Child Support and the New Rules for Turnover" article appearing in the Summer 1990 issue of the Corpus Christi Lawyer. Co authored by Catherine N. Tyree, 206 Indiana, Corpus Christi, Texas 78404; telephone 512/882-3350.

(b) "The Effect of Alimony on Child Support Under the Legislative Guidelines," Corpus Christi Bar Association 1991 Family Law Seminar: An Update seminar course book March 22, 1991. Co authored by Catherine N. Tyree, 206 Indiana, Corpus Christi, Texas 78404; telephone 512/882-3350.

(c) "The Advocacy of the Attorney Ad Litem in DHS Cases," an article that went into course book for Corpus Christi Young Lawyers Association Ad Litem Seminar, March 12, 1992, Corpus Christi, Texas.

13. Health: What is the present state of your health? List the date of your last physical examination.

My health is good and my last physical was July 20, 1993.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

None.

15. Citations: If you are or have been a judge, provide (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

N/A.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

I have not held any public elected office. I was, however, appointed by the Corpus Christi City Council in May, 1977, for a 1-year term on the Corpus Christi Board of Equalization. This board was the taxpayers' appeal board to appeal real estate and personal property tax valuations assigned by the actual appraising authority. This board is no longer in existence but has been phased into a joint county-wide appellate board.

17. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:
1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

No.

2. whether you practiced alone, and if so, the addresses and dates;

I have always been a sole practitioner since I opened my practice in August of 1981. The locations are as follows:

(a) August, 1981, until Spring 1982 - 616 S. Tancachua, Corpus Christi, Texas.

(b) Spring 1982 to September, 1989 - 401 N. Tancachua, Corpus Christi, Texas.

(c) September, 1989 to present - 1650 Texas Commerce Plaza, 802 N. Carancahua, Corpus Christi, Texas.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

I have never been of counsel or a member of any law firm, offices, governmental agencies.

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

(a) From 1981 to 1985, my practice was mainly family law and criminal defense work.

(b) 1986 to 1989 was a bit of a transition period for me in that I stopped criminal practice and concentrated about 50 to 70 percent of my practice on family law including the representation of abused and neglected children. I also began about this time to handle some home construction cases.

(c) From 1989 to present, the remainder of my practice was general civil including the representation of employers in employee rights litigation as well as some litigation in business torts involving deceptive trade practices and contract actions. I have continued to represent abused and neglected children.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

I was certified by the Texas Board of Legal Specialization in the area of family law in 1986 and re-certified in 1991.

(a) I continue to represent abused and neglected children. This representation is either pro bono or if the action involves the Department of Human Services, the county pays some of my fees on a much reduced rate.

(b) I usually represent divorce clients with estates in excess of \$1,000,000.00. Family law over the years has become more and more complex and sophisticated in that lawyers dealing with large estates must have knowledge of partnerships, corporations, joint ventures, tax consequences of property division, and securities law. Further, when any division of property between two or more people occurs, the lawyers handling this division must know how to prepare all the documents for that division, including real estate, UCC filings, collateral pledge agreements for shares, etc.

It is necessary in my representation of these clients in the division of the estates not only to become familiar with the laws governing the various business entities but also to become familiar with the various appraisal methods of each entity, how said entities are capitalized, and how best to divide on behalf of my client said property, including such items as farming enterprises, oil and gas drilling companies, oil and gas holding companies, construction companies, and professional and service corporations. It is usually necessary to hire accountants and various appraisers. One of the pleasures of family law is the opportunity to familiarize oneself with various other fields of law. In the past 5 years, family law has involved the inclusion of personal injury actions such as assault, battery, fraud, and breach of fiduciary duty.

(c) I represented within the last two years individual lawyers and a law partnership that were each accused of tortious conduct surrounding the firing of a business manager. I represented a chief appraiser of our county appraisal entity who was accused of sexual harassment. I have been local counsel for a multi-national drilling company in a suit against Bethlehem Steel alleging the faulty design, etc. of a one-of-a-kind drilling rig.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I appear in court frequently.

2. What percentage of these appearances was in:

(a) federal courts; *3% to 4%

(b) state courts of record; *96% to 97%

(c) other courts. *0%

*overall average of the past 12 years in practice

3. What percentage of your litigation was:

(a) civil; *85%

(b) criminal. *15%

*overall average of the past 12 years in practice

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

165 (estimated). Co-counsel 6; all other sole counsel.

5. What percentage of these trials was:

(a) jury: *8%

(b) non-jury. *92%

*overall average of the past 12 years in practice

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;

(b) the name of the court and the name of the judge or judges before whom the case was litigated; and

(c) The individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

(i) MARINE DRILLING MANAGEMENT COMPANY VS. BETHLEHEM STEEL CORPORATION; Civil Action No. C-91-229 in the United States District Court for the Southern District of Texas, Corpus Christi Division

MARINE DRILLING MANAGEMENT COMPANY VS. BETHLEHEM STEEL CORPORATION; Cause No. 91-3598-C in the 94th Judicial District Court, Nueces County, Texas

Brief summary of substance of case. This was a very complex Texas Deceptive Trade Practices Act, UCC, breach of warranty and breach of contract case regarding alleged defective design of a \$26,000,000 one-of-a-kind offshore drilling rig purchased by Marine Drilling from Bethlehem Steel.

Party represented: Marine Drilling Management Company

Nature of participation in litigation. Co-counsel with Susman Godfrey, L.L.P. of Houston. I represented Marine Drilling as primary counsel in some of the discovery hearings before the court and discovery matters before the special discovery master and participated in opposing motions for summary judgment and continuances. Richard Drubel of Susman Godfrey was lead counsel.

Final disposition. Sealed settlement

Date of Representation. July, 1991 - January, 1993

Name of court and name of judge or judges before whom case was litigated. 94th Judicial District Court, Nueces County, Texas; Honorable Vernon D. Harville (Retired, 105th Judicial District Court, Nueces County, Texas); Honorable Jack Hunter, 94th Judicial District Court, Nueces County, Texas

Name, address and telephone number of co-counsel.

Susman Godfrey, L.L.P. - Richard B. Drubel, Eric Mayer and J. Hoke Peacock, III, 5100 First Interstate Bank Plaza, 1000 Louisiana, Houston, Texas 77002-5096; telephone 713/651-9366

Jose Longoria, 4525 Gollihar, Suite 100, Corpus Christi, Texas 78411; telephone 512/857-0233

Kipling F. Layton, 4646 Corona Drive, Suite 140, Corpus Christi, Texas 78466-6369; telephone 512/854-4474

Name, address and telephone number of opposing counsel.

Darrell L. Barger, Hunt, Hermansen, McKibben & Barger, 1100 First City Tower II, 555 North Carancahua, Corpus Christi, Texas 78478; telephone 512/882-6611

Wayne Clawater, McFall & Sartwelle, 2500 Two Houston Center, 909 Fannin Street, Houston, Texas 77010-1003; telephone 713/951-1000

(ii) LINDAGAY GILLEY VS. NUECES COUNTY TAX APPRAISAL DISTRICT, GEORGE MOFF, SYLVIA ORTIZ AND SHIRLEY MITCHELL; Cause No. 87-6560-G; 319th Judicial District Court, Nueces County, Texas

Brief summary of substance of case. This case involved EEOC claims as well as alleged wrongful termination causes of action against my client who was the chief appraiser and employee of the Nueces County Appraisal District. The Appraisal District was also sued. A successful partial motion for summary judgment was granted in favor of my client on several claims.

Party represented: George Moff

Nature of participation in litigation. Sole counsel for chief tax appraiser of the Appraisal District

Final disposition. Jury verdict in favor of my client and the Nueces County Appraisal District.

Date of Representation. December, 1987 - February, 1990

Name of court and name of judge or judges before whom case was litigated. 319th Judicial District Court, Nueces County, Texas; Honorable Max Bennett, Judge, 319th Judicial District Court, Nueces County, Texas

Name, address and telephone number of other counsel involved.

Bruce L. James (attorney for Nueces County Appraisal District), Kleberg & Head, P.C., 1200 CCNB Center North, Corpus Christi, Texas 78471; telephone 512/884-3551

Kathryn Snapka (attorney for two co-defendants), 804 Wilson Building, P. O. Box 23017, Corpus Christi, Texas 78403; telephone 512/888-7676

Name, address and telephone number of opposing counsel. Bill Kolb, 500 Texas Commerce Plaza, Corpus Christi, Texas 78470; telephone 512/884-9986

(iii) IN THE MATTER OF THE MARRIAGE OF MARIAN F. KULLIN AND ROBERT ROTHWELL KULLIN; Cause No. 90-4979-B; 117th Judicial District Court of Nueces County, Texas

Brief summary of substance of case. This was a divorce action in a long-term marriage which involved the valuation and division of corporations and partnerships, multiple accounting issues, real estate issues and security agreements.

Party represented: Marian F. Kullin

Nature of participation in litigation. Sole counsel for petitioner Marian F. Kullin

Final disposition. Tried before the special master with Mrs. Kullin prevailing in a majority of the liquid assets.

Date of Representation. September, 1990 - October, 1991

Name of court and name of judge or judges before whom case was litigated. 117th Judicial District Court, Nueces County, Texas; Michael P. O'Reilly, appointed by the 148th District Court as special master to preside over this case

Name, address and telephone number of co-counsel. None

Name, address and telephone number of opposing counsel.
Mark H. Giles, 708 CCNB Center North, 500 N. Water,
Corpus Christi, Texas 78471; telephone 512/882-7461

(iv) DALE JENSEN VS. KLEBERG AND HEAD, A PARTNERSHIP, ET AL;
Cause No. 89-5236-C; 94th Judicial District Court, Nueces
County, Texas

Brief summary of substance of case. This was a case
involving allegations of age discrimination and breach of
an employment contract.

Party represented: Two partners in firm of Kleberg and
Head

Nature of participation in litigation. I was sole
counsel for two individual partners in the law firm of
Kleberg & Head.

Final disposition. Summary judgment in favor of my two
clients

Date of Representation. September, 1991 - June, 1992

Name of court and name of judge or judges before whom
case was litigated. 94th Judicial District Court, Nueces
County, Texas; Honorable Vernon Harville (Retired, 105th
Judicial District Court, Nueces County, Texas); Honorable
Jack Hunter, 94th Judicial District Court, Nueces County,
Texas

Name, address and telephone number of co-counsel.
Jorge C. Rangel, Rangel & Chriss (counsel for a co-
defendant), 719 S. Shoreline Blvd., Suite 502, Corpus
Christi, Texas 78401; telephone 512/883-8555
Franci N. Beck, Susman Godfrey, L.L.P. (counsel for
Kleberg & Head corporation), 5100 First Interstate Bank
Plaza, 1000 Louisiana, Houston, Texas 77002-5096;
telephone 713/651-9366

Name, address and telephone number of opposing counsel.
James R. Harris and J. Norman Thomas, Harris & Thomas, P.
O. Drawer 1901, Corpus Christi, Texas 78403; telephone
512/883-1946

(v) IN THE MATTER OF THE MARRIAGE OF DARLA GAYE RABALAIS AND RAYMOND EARL RABALAIS; Cause No. 91-0100-F; 214th Judicial District Court, Nueces County, Texas

Brief summary of substance of case. This is a case that had tort allegations of fraud, constructive trust allegations against a third party. The business entities included the main business of an electrical contracting company, real estate entities, and a small antique business. This is a case that involved multiple appraisers, CPA's on both sides, and was very interesting to try.

Party represented: Darla Gaye Rabalais, petitioner

Nature of participation in litigation. Sole counsel for Darla Gaye Rabalais, petitioner

Final disposition. This case was settled about the second or third day of trial.

Date of Representation. January, 1991 - July, 1992

Name of court and name of judge or judges before whom case was litigated. 214th Judicial District Court, Nueces County, Texas; Honorable Mike Westergren, 214th Judicial District Court, Nueces County, Texas

Name, address and telephone number of co-counsel. None

Name, address and telephone number of opposing counsel.
Larry J. Adams, 870 First City Tower II, Corpus Christi, Texas 78478; telephone 512/887-7014
Kenneth R. Hannam, 4646 Corona, Suite 140, Corpus Christi, Texas 78466; telephone 512/854-4474

(vi) IN THE INTEREST OF MIGUEL ANGEL GONZALEZ, JR., CHRISTINA ANN GONZALEZ, VALERIE ROSE CORRALES, AND JUAN MARCOS LOPEZ, JR., MINOR CHILDREN; Cause No. 91-1326-C; 94th Judicial District Court, Nueces County, Texas

Brief summary of substance of case. This is a case where four children, the oldest of which was 10 years old, had been the subject of 19 referrals to the Texas Department of Human Services. 17 of the 19 referrals were verified; only 2 were non-verified. The first such referral was when the oldest child was 9 months old and the mother's live-in boyfriend attempted to shove beer down his throat. As a result of this incident, the boy had

pneumonia and was hospitalized. The last few referrals had primarily to do with the two daughters who told their school principal, their teachers, day care workers, and the Department of Human Services workers repeatedly that they were being sexually abused by their mother's boyfriends and other adult males in the family. These children were repeatedly re-placed in their home after the mother would agree to parenting classes, finding a new boyfriend, etc. The last referral that brought them into the court system was again an allegation of sexual abuse by a boyfriend that had been the subject of numerous prior allegations of sexual abuse. I was appointed at that time to represent all 4 children. I filed a termination on behalf of the children against the mother and all 4 fathers, both known and unknown.

Party represented: Court appointed attorney ad litem for children

Nature of participation in litigation. I tried this termination successfully to the court.

Final disposition. The mother and fathers were terminated. The children are now all 4 together in an adoption placement out of state. The "step-father" who repeatedly abused the daughters over the years pled guilty to 1 or more counts of sexual abuse of minors.

Date of Representation. March 5, 1991 until final adoption placement occurs

Name of court and name of judge or judges before whom case was litigated. 94th Judicial District Court, Nueces County, Texas; Honorable Jack Hunter, 94th Judicial District Court, Nueces County, Texas

Name, address and telephone number of co-counsel. None

Name, address and telephone number of opposing counsel.
 Jim McCollum, Nueces County Attorney's Office, Nueces County Courthouse, 901 Leopard Street, Corpus Christi, Texas 78401; telephone 512/888-0286
 Michael George, 918 Antelope, Corpus Christi, Texas 78401; telephone 512/880-4040
 Clyde Wright, III, 610 Stirman, Corpus Christi, Texas 78411; telephone 512/880-5923

(vii) IN THE MATTER OF THE MARRIAGE OF RONALD WILLIAMS CLEVINGER AND CINDY FLORAMELL HUNT CLEVINGER AND IN THE INTEREST OF CRYSTAL LYNN CLEVINGER, A CHILD; Cause No. 82-3803-G; 319th Judicial District Court, Nueces County, Texas

Brief summary of substance of case. The significance of this decision and legal issues and legal roles is that even though my client received the vast majority of the property, the client on the other side who is now Cindy Wilson, subsequently went to law school and now refers me a large number of cases.

Party represented: Ronald William Clevenger, petitioner

Nature of participation in litigation. Sole counsel for petitioner

Final disposition. Final decree of divorce entered January 21, 1983

Date of Representation. August 17, 1982 - March 30, 1983

Name of court and name of judge or judges before whom case was litigated. 319th Judicial District Court, Nueces County, Texas; Honorable Max Bennett, 319th District Court, Nueces County, Texas

Name, address and telephone number of co-counsel. None

Name, address and telephone number of opposing counsel. Harry Dobbs, Jr., 200 Mormac Building, 321 Texan Trail, Corpus Christi, Texas 78411; telephone 512/854-7816

(viii) IN THE MATTER OF THE MARRIAGE OF NORMA LINDA RODRIGUEZ AND ALFREDO RODRIGUEZ AND IN THE INTEREST OF JEANNIE J. RODRIGUEZ AND ANTHONY M. RODRIGUEZ, MINOR CHILDREN; Cause No. 92-247-F; 214th Judicial District Court, Nueces County, Texas

Brief summary of substance of case. My role in the legal questions is that this is the largest disproportionate division of community property a client of mine has ever received based on the standards in Murff v. Murff, 615 S.W.2d 696 (Tex. 4/29/81, rehearing denied 6/10/81), such as fault in the breakup of the marriage, length of the marriage, number of children, relative earning power of the spouses.

Party represented: Norma Linda Rodriguez, petitioner

Nature of participation in litigation. Sole counsel for petitioner

Final disposition. Final decree entered on May 3, 1993

Date of Representation. February 2, 1992 to present

Name of court and name of judge or judges before whom case was litigated. 214th Judicial District Court, Nueces County, Texas; Honorable Mike Westergren, 214th Judicial District Court, Nueces County, Texas

Name, address and telephone number of co-counsel. None

Name, address and telephone number of opposing counsel.
(Feb. 1992 - June, 1992) - Mark H. Giles, 708 CCNB Center North, 500 N. Water, Corpus Christi, Texas 78471; telephone 512/882-7461
June, 1992 to present) - Jeanne Chastain, 604 W. Broadway, Portland, Texas 78374; telephone 512/643-0550

(ix) IN THE MATTER OF THE MARRIAGE OF SHIRLEY L. EVANS AND LAWRENCE GUY EVANS; Cause No. 25143-A; 36th Judicial District Court, San Patricio County, Texas

Brief summary of substance of case. This was the first client I represented with a fairly large estate where I learned the value of appraisers and CPA's in valuing retirement plans, business interests, etc.

Party represented: Shirley L. Evans, petitioner

Nature of participation in litigation. Sole counsel for petitioner

Final disposition. Final decree of divorce entered May 4, 1984

Date of Representation. October, 1983 - May, 1984

Name of court and name of judge or judges before whom case was litigated. 36th Judicial District Court, San Patricio County, Texas; Honorable Ronald P. Yeager, 36th Judicial District Court, San Patricio County, Texas

Name, address and telephone number of co-counsel. None

Name, address and telephone number of opposing counsel.
Charles R. Cunningham, 503 Wilson Tower, Corpus Christi,
Texas 78476; telephone 512/884-9337

(x) IN THE INTEREST OF BABY BOY WASSERMAN, A MINOR CHILD;
Cause No. 91-4538-F; 214th Judicial District Court, Nueces
County, Texas

Brief summary of substance of case. This really was an uncomplicated adoption, however, this couple was my daughter's first soccer coach and their two children with whom my daughter had been friends both died as teenagers of cystic fibrosis. This couple had a great deal of love and experience to give to and share with a child but because of their age (mid-40's), they went to the bottom of the list with standard adoption agencies. Their church just happened to have a parishioner at a young age who was pregnant and wanted her child placed for adoption. This was an agreed adoption all the way around and it was a pleasure for me to be of some assistance.

Party represented: Robert and Patricia Lambright,
petitioners

Nature of participation in litigation. Attorney for Robert and Patricia Lambright, petitioners, in termination and adoption proceedings.

Final disposition. Termination and adoption granted October 9, 1991

Date of Representation. January, 1990 - January, 1992

Name of court and name of judge or judges before whom case was litigated. 214th Judicial District Court, Nueces County, Texas; Honorable Mike Westergren, 214th District Court, Nueces County, Texas

Name, address and telephone number of co-counsel. None

Name, address and telephone number of opposing counsel.
Ann Coover, 921 N. Chaparral, Corpus Christi, Texas
78401; telephone 512/882-2100 (attorney for biological
mother)

Debby Montelongo, 900 The 600 Building, Corpus Christi,
Texas 78473; telephone 512/888-8898 (court appointed ad
litem for the child)

Barry Brown, Suite 900 Wilson Plaza East, Corpus Christi, Texas 78476; telephone 512/884-8221 (court appointed attorney ad litem for unknown father)

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

(a) Representation of abused and neglected children. I consider that it has been a privilege to have been able to represent these children over the years. Unfortunately, on most occasions the damage that is done to these children cannot be reversed. A natural progression of this advocacy was my two years service on the Nueces County Juvenile Citizen Advisory Board. Most often these children who find their way to the criminal docket have been abused and neglected children. I regret that I have not done more.

(b) I have recently been certified by Attorney-Mediators Institute as a mediator and qualify under the mediation statutes of this state for mediation in general civil law as well as family law. I have been involved as counsel in mediation though I have actually mediated very few cases. I find this to be an area that should be supported not only by the bar but by the community at large. Many litigants successfully consider a mediation "their day in court" and further are able to participate in the fashioning of their own remedy. I believe this to be a cost effective method of resolving disputes.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

The clients I now have are billed on an hourly basis. I have no continuing plans to represent these clients should I become a federal judge. I anticipate having some amount of accounts receivable should I indeed become a federal judge and I will make independent arrangements for continued billing of these clients who are all individuals.

In the State of Texas, the Disciplinary Rules and Ethical Considerations promulgated by the Supreme Court of Texas allow for a forwarding attorney to have a contingency fee contract to be split between the main counsel and the forwarding attorney. Should I become confirmed, my financial interest in any contingency fee cases shall revert to that of a forwarding attorney wherein I would receive 1/3 or 1/2 of the attorney's fees collected.

See attached financial statements (Exhibit A) for all other stocks, amounts of any income, future benefits, etc. that are not related to my law practice.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

(a) Resolution of Any Potential Conflict of Interest.
I understand that my financial records will be subject to public disclosure. I would not, however, rely on litigants who might come before me and their attorneys to bring to my attention any conflict regarding the financial assets that might be held in my name or my husband's name. It is extremely important for a judge to call to the attention of the litigants' attorneys any possible conflict and on the court's own motion remove itself from consideration of any case where the judge's impartiality might be called into question by a reasonable person.

(b) Categories of Litigation and Financial Arrangements That Are Likely to Present Potential Conflicts-of-Interest.

(i) Certainly in any litigation the subject matter of which I would have a financial interest as per my financial statement, I will recuse myself.

(ii) Any area in which I would have extra-judicial information that might affect my ability to be fair and impartial, I would recuse myself. This would have to be determined on a case-by-case basis.

(iii) I will also recuse myself from hearing any litigation in which any law firm is involved that may be simultaneously acting in any case in which I may retain a contingency fee financial interest as discussed supra in question 1.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honaria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See copy of Financial Disclosure Report attached and labeled Exhibit B.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

Attached and labeled "Exhibit A to Questionnaire for Judicial Nominees" is financial net worth statement.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidates, dates of the campaign, your title and responsibilities.

My strictly voluntary political activities have been limited to the following:

<u>Candidate and Office Sought</u>	<u>Date</u>	<u>My Participation</u>
(a) Judge Eric Brown, Judge, 28th Judicial District Court of Texas	1992	Steering committee
(b) Ramiro Canales, Nueces County Tax Assessor-Collector	1992	Campaign treasurer
(c) Judge Jack Hunter, Judge, 94th Judicial District Court of Texas	1993	*Steering committee *(my name was removed from the steering steering committee after my recommendation to position of Federal District Judge)
(d) Judge Mike Westergren Nueces County Attorney	1976	Steering committee
(e) Judge Mike Westergren Judge, 214th Judicial District Court of Texas	1992	Steering committee
(f) Bob Krueger U. S. Senate	1978	Local coordinator
(g) Bob Krueger U. S. Senate	1993	Supporter
(h) Governor Ann Richards Texas State Treasurer	1982 1986	Supporter
(i) Governor Ann Richards Governor of State of Texas	1990	Supporter

(j) Unify Corpus Christi (a ticket of six or seven candidates for Corpus Christi City Council)	1977	Supporter and calendared speaking activities for candidates
(k) Senator Lloyd Bentsen U. S. Senate	1976 1982	Supporter
(l) John Young U. S. Congress	1978	Organized Women for Young in Nueces County, Texas

20

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.
 - (a) During the early years of the Nueces County pro bono panel, I participated in representing poor and disadvantaged people. I have not participated in this program for some time.
 - (b) Until the Nueces County Attorney established a Women's Protective Unit, I represented pro bono all of the women at the local women's shelter who needed protective orders.
 - (c) There is a local priest who sends me his parishioners who are disadvantaged and need very minor assistance in the way of wills, powers of attorney, living wills, etc.
 - (d) I represent the local Planned Parenthood pro bono and have for many years.
 - (e) In the last 12 months, I have participated in fund raising activities for the Coastal Bend Council for the Deaf, where I am an honorary trustee, and also for the YWCA, Spohn Hospital Foundation, KEDT public radio station (participated in fund raiser). I also participated in a fund raising auction for the Corpus Christi Art Museum.
 - (f) In the late 1970's I participated as co-chair in the United Negro College Fund Telethon.
 - (g) I helped build and furnish the local Women's Shelter.
 - (h) I helped remodel and furnish Planned Parenthood office in 1977-1978.
 - (i) I was a member of the Nueces County Juvenile Citizen Advisory Board for several years (1991 and 1992).
 - (j) Within the last 12 months, I have spoken at Career Day activities at local schools.

(k) In the mid-1980's I was a committee member of the Corpus Christi Bar Association and Nueces County Medical Society Committee for the Establishment of Rape Examination Nurse Program for the City of Corpus Christi.

(l) I lectured at Del Mar College on the legal rights of women and on nursing and the law from 1982 to 1987.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

No.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

Senator Krueger appointed a selection commission of lawyers and lay people for the Southern District I believe sometime in late January or February of 1993. The applications went through this committee as well as all interviews. The committee interviewed each and every applicant as well as each and every person that they had heard from any source was interested in the federal bench. My interview with the committee was on Saturday, April 24, 1993. It is my understanding that the committee recommended my name to Senator Krueger. I was called by Senator Krueger on May 18, 1993, and was told by him that he was going to recommend me for the federal bench and to please not tell anyone other than my husband until the other applicants received a mailing from Senator Krueger. Until May 18, 1993, I never spoke to Senator Krueger about this nomination. The entire application process was handled by the Senator's committee.

I completed and forwarded several forms to the White House on July 20, 1993.

I had a telephone interview with a representative of the U. S. Department of Justice during the week of August 9, 1993. I appeared in Washington, D.C. for a personal interview with several representatives of the U. S. Department of Justice on September 10, 1993.

I was interviewed by agents for the Federal Bureau of Investigation on September 13 and 14, 1993. Also, on September 13, 1993, I was notified by the U. S. Department of Justice to send copies of my ABA Personal Data Questionnaire to the Chair of the American Bar Association Standing Committee on Federal Judiciary and to the American Bar Association Investigator. I had two or three follow-up telephone calls from the FBI agent over the next month.

I had a personal interview with the ABA investigator on September 29, 1993. I believe there may have been one follow-up telephone conversation with the ABA investigator.

I was notified on November 19, 1993, by the office of White House Counsel of my nomination by the President of the United States.

Finally, from mid September to early November, I made numerous calls to the U. S. Department of Justice to check on the status of my nomination.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and without society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

I would like to make the following preliminary statement:

(1) I have a deeply rooted belief in the checks and balances system between the three branches of the federal government.

(2) I believe strongly that the federal judiciary should courageously accept its constitutional mandate without fear of political retaliation.

With that introduction in mind, I must also state that I do not believe that a judicial opinion should ever be broader than is absolutely necessary to decide the issue presented to the court. It is my opinion that any member of the judiciary must have a firm and complete understanding of the likely consequences of a ruling and, where possible, should take that into consideration in fashioning a remedy. As for any loosening jurisdictional requirements, the federal courts are courts of limited jurisdiction. Without commenting on the appropriateness of the judiciary imposing itself on other entities in an administrative or oversight capacity, it is my opinion that the judiciary is not equipped financially or administratively to take on these responsibilities.

Exhibit B
to Questionnaire for Judicial Nominees
(copy of Financial Disclosure Report)

AO-10
Rev. 1/93

FINANCIAL DISCLOSURE REPORT

Report Required by the Ethics
Reform Act of 1989, Pub. L. No.
101-194, November 30, 1989
(5 U.S.C.A. App. 6, §§101-112)

1. Person Reporting (Last name, first, middle initial) Jack, Janis G.	2. Court or Organization U.S. District Court Southern District of Texas	3. Date of Report November 22, 1992
4. Title (Article III Judges indicate active or senior status; Magistrate Judges indicate full- or part-time) Nominee for U.S. District Court Southern District of Texas	5. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date Nov. 10, 1993 ____ Initial ____ Annual ____ Final	6. Reporting Period January 1, 1992 Through October 31, 1993
7. Chambers or Office Address 1650 Texas Commerce Plaza Corpus Christi, TX 78470	8. On the basis of the information contained in this Report, it is, in my opinion, in compliance with applicable laws and regulations ____ Reviewing Officer's Signature _____	

IMPORTANT NOTES: *The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on last page.*

I. POSITIONS. (Reporting individual only; see pp. 7-8 of Instructions.)

POSITIONNAME OF ORGANIZATION/ENTITY☐

NONE (No reportable positions)

Past Boardmember (91 & 92)

Nueces County Juvenile Citizen Advisory Board

Committee Member (91, 92 & 93)

Humana Hospital Institutional Review Board

Continued on Attachment No. 1

II. AGREEMENTS. (Reporting individual only; see p. 8-9 of Instructions.)

DATEPARTIES AND TERMS☒

NONE (No reportable agreements)

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 9-12 of Instructions.)

DATESOURCE AND TYPEGROSS INCOME

(Honoraria only)

(yours, not spouse's)

☐

NONE (No reportable non-investment income)

1		
2	Compensation for Services from Cardiology Associates of Corpus Christi (\$)	\$ N/A
3		\$
4	Gross Business Income, Janis G. Jack, Attorney at Law (Several clients paid more than \$5,000 each)	\$ 649,754
5		\$
		\$

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

Jack, Janis G.

Date of Report

November 22, 1993

IV. REIMBURSEMENTS and GIFTS – transportation, lodging, food, entertainment.
 (Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp.13-15 of Instructions.)

SOURCEDESCRIPTION☐

NONE (No such reportable reimbursements or gifts)

EXEMPT

1		
2		
3		
4		
5		
6		
7		
8		

V. OTHER GIFTS. (Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp.15-16 of Instructions.)

SOURCEDESCRIPTIONVALUE☐

NONE (No such reportable gifts)

EXEMPT

1		\$
2		\$
3		\$
4		\$

VI. LIABILITIES. (Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp.16-18 of Instructions.)

CREDITORDESCRIPTIONVALUE CODE*☐

NONE (No reportable liabilities)

1	Harbor Financial Mortgage Corp.(J)	Mortgage on condo-Houston, TX	K
2			
3			
4			
5			
6			
7			

* VALUE CODES: J = \$15,000 or less K = \$15,001 to \$50,000 L = \$50,001 to \$100,000 M = \$100,001 to \$250,000
 N = \$250,001 to \$500,000 O = \$500,001 to \$1,000,000 P = More than \$1,000,000

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

Jack, Janis G.

Date of Report

November 22, 1993

VII. INVESTMENTS and TRUSTS -- income, value, transactions. (Includes those of spouse and dependent children; see pp. 18-27 of Instructions.)

A. Description of Assets (including trust assets) Indicate, where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of reporting individual and spouse, (S) for separate ownership by spouse, (OC) for ownership by dependent child. Place "(X)" after each asset exempt from prior disclosure.	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1)	(2)	(1)	(2)	If not exempt from disclosure				
	Am't Code (A-B)	Type (S), rent or int.)	Value Code (J-P)	Value Method Code (Q-W)	(1) Type (a-g), buy, sell, margin, redemption	(2) Date: Month Day	(3) Value Code (J-P)	(4) Gain Code (A-B)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)									
1 Cash (detail on attachment No. 2)							EXEMPT		
2									
3 Investments (detail on attachment No. 2)							EXEMPT		
4									
5 Retirement plans and accounts and Life Insurance (detail on attachment No. 2)							EXEMPT		
6									
7									
8									
9									
10									
11									
12									
13									
14									
15									
16									
17									
18									
19									
20									
1 Income/Gain Codes: (See Col. B1 & D4)	A=\$1,000 or less F=\$15,001 to \$50,000	B=\$1,001 to \$2,500 R=\$50,001 to \$100,000	C=\$2,501 to 5,000 O=\$100,001 to \$1,000,000	D=\$5,001 to \$15,000 B=more than \$1,000,000					
2 Value Codes: (See Col. C1 & D3)	J=\$15,000 or less M=\$250,001 to \$500,000	K=\$15,001 to \$50,000 O=\$500,001 to \$1,000,000	L=\$50,001 to \$100,000 P=more than \$1,000,000	N=\$100,001 to \$250,000					
3 Value Method Codes: (See Col. C2)	Q=Appraisal U=Book Value	R=Cost (real estate only) V=Other	S=Assessors W=Estimated	T=Cash/Market					

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

Jack, Janis G.

Date of Report

November 22, 1993

VIII. ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate part of Report.)

Part VII TYPE OF INCOME:

1. Gain on installment sale
2. Income / loss from a subchapter S Corporation
3. Income / loss from a partnership
4. Income from proprietorship included in Part III, NON-INVESTMENT INCOME
5. Income includes insurance proceeds of \$76,558 received in 1993 for fire damage
6. Dividends on life insurance policies which are used to pay the premiums on the policy
7. Includes proceeds from a lawsuit settlement of \$27,919 in 1992.

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C.A. app. 7, § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature

Janis Graham Jack

Date

11-22-93

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C.A. APP. 6, § 104, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Judicial Ethics Committee
Administrative Office of the
United States Courts
Washington, DC 20544

AO-10
Rev. 1/93

FINANCIAL DISCLOSURE REPORT

ATTACHMENT NO. 1

Report Required by the Ethics
Reform Act of 1989, Pub. L. No.
101-194, November 30, 1989
(5 U.S.C.A. App. 6, §§101-112)

1. Person Reporting (Last name, first, middle initial) Jack, Janis G.	2. Court or Organization U.S. District Court Southern District of Texas	3. Date of Report November 22, 1993
4. Title (Article III judges indicate active or senior status; Magistrate judges indicate full- or part-time)	5. Report Type (check appropriate type) ____ Nomination, Date _____ ____ Initial ____ Annual ____ Final	6. Reporting Period
7. Chambers or Office Address	8. On the basis of the information contained in this Report, it is, in my opinion, in compliance with applicable laws and regulations _____ Reviewing Officer Signature _____	

IMPORTANT NOTES: *The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on last page.*

I. POSITIONS. (Reporting individual only; see pp. 7-8 of Instructions.)

POSITIONNAME OF ORGANIZATION/ENTITY☐

NONE (No reportable positions)

Committee Member (92)

Corpus Christi Bar Association, C.L.E. Committee

Lawyer (91, 92 & 93, Resigned
11-19-93)

Planned Parenthood of South Texas

II. AGREEMENTS. (Reporting individual only; see p. 8-9 of Instructions.)

DATEPARTIES AND TERMS☐

NONE (No reportable agreements)

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 9-12 of Instructions.)

DATESOURCE AND TYPEGROSS INCOME
(yours, not spouse's)

(Honoraria only)

☐

NONE (No reportable non-investment income)

1	_____	\$ _____
2	_____	\$ _____
3	_____	\$ _____
4	_____	\$ _____
5	_____	\$ _____

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting
Jack, Janis G.Date of Report
November 22, 1993

VII. INVESTMENTS AND TRUSTS

ATTACHMENT NO. 2

A. Description of Assets	B. Income during reporting per		C. Gross value at end of reporting period		D. Transaction during reporting period
	(1) Amount Code	(2) Type	(1) Value Code	(2) Value Method Cod	
CASH					
CITIZENS STATE BANK P.O. Box 4007 Corpus Christi, Texas 78469 Checking #399-195-401 (J) CD #397200328 (S) CD #354457529 (J)	C	INT	L	T	EXEMPT
AMERICAN BANK 100 American Bank Plaza Corpus Christi, Texas 78475 Checking #210015469	A	INT	J	T	EXEMPT
NAVY FEDERAL CREDIT UNION (S) San Antonio, Texas Account #0231134-008	A	INT	J	T	EXEMPT
BANK OF AMERICA (formerly First Gibraltar) 101 N. Shoreline Corpus Christi, Texas 78401 Checking #31-586-981-4 (J) Savings #34-36566-4 (J) CD #470149396 (J) Checking #31-294330-7 (J) Savings #34-129228-9 (DC) Checking #31-586975-6 (DC) Savings #34-0571-87-3 (DC)	D	INT	L	T	EXEMPT
PIONEER BANK (DC) 4000 W. North Ave. Chicago, Ill. 60639 CD #16-197-03030 36	A	INT	J	T	EXEMPT

FINANCIAL DISCLOSURE REPORT
VII. INVESTMENTS AND TRUSTS

Name of Person Reporting
Jack, Janis G.

Date of Report
November 22, 1993

ATTACHMENT NO. 2

A. Description of Assets	B. Income during reporting per		C. Gross value at end of reporting period		D. Transaction during reporting period
	(1) Amount Code	(2) Type	(1) Value Code	(2) Value Method Cod	
INVESTMENTS					
INVEST FINANCIAL CORP P.O. Box 31536 Tampa, Florida 33631-3536 Account #4011-3797 (S) Account #4011-3761 (DC)	D	DIV	M	T	EXEMPT
PAINE WEBBER RMA TAX-FREE (J) FUND, INC 800 N. Shoreline, Suite 160, North Tower Corpus Christi, Tx. 78401-3701 Account #HH02706-04	C	INT	M	T	EXEMPT
DEFINED ASSET FUNDS (J) The Bank of New York, Trustee Unit Investment Trust P.O. Box 974 Wall Street Station New York, New York 10268-0974 Customer #01205761	A	INT	J	W	EXEMPT
NOTE REC. - ROBERT BALL, M.D.(J) Installment sale gain	B D	INT 1	A -	W	EXEMPT
100 SHS CARDIOLOGY ASSOC OF (S) CORPUS CHRISTI, INC.	-	NONE	N	W	EXEMPT
150 SHS COASTAL BEND HEALTH (S) PLAN	-	NONE	J	W	EXEMPT
13.67% INTEREST IN CORPUS (S) CHRISTI CARDIAC REHAB CENTER, INC. (S CORP)	A	2	K	W	EXEMPT
20% INTEREST IN C.C. MEDICAL(S) MANAGEMENT SERVICES, INC. (S CORP)	A	2	J	W	EXEMPT

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting
Jack, Janis G.Date of Report
November 22, 1993

VII. INVESTMENTS AND TRUSTS

ATTACHMENT NO. 2

A. Description of Assets	B. Income during reporting per		C. Gross value at end of reporting period		D. Transaction during reporting period
	(1) Amount Code	(2) Type	(1) Value Code	(2) Value Method Cod	
INVESTMENTS (con't)					
20% PARTNER, SO. TEXAS HEART(S) ASSOC.	E	3	K	W	EXEMPT
2.58% PARTNER, MEDICAL PLAZA(S) ASSOC.	A	3	L	W	EXEMPT
20% PARTNER, GULF COAST (S) CARDIOLOGY ASSOC.	E	3	K	W	EXEMPT
30.38% LTD PARTNER, (S) STONEGATE MEDICAL LTD.	F	5	K	W	EXEMPT
11.1% LTD PARTNER, THIRD (S) STREET MEDICAL COMPLEX	A	3	K	W	EXEMPT
CONDO INTEREST, PORT (J) ARANSAS, TX	E	7	L	W	EXEMPT
CONDO INTEREST, KERR COUNTY, (J) TEXAS	D	RENT	L	W	EXEMPT
CONDO INTEREST, HOUSTON, (J) TEXAS	B	RENT	K	W	EXEMPT
EQUIPMENT LEASING COMPANY (DC)	D	RENT	J	W	EXEMPT
JAN JACK, ATTORNEY AT LAW	-	4	L	W	EXEMPT

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting
Jack, Janis G.Date of Report
November 22, 1993

VII. INVESTMENTS AND TRUSTS

ATTACHMENT NO. 2

A. Description of Assets	B. Income during reporting per		C. Gross value at end of reporting period		D. Transaction during reporting period
	(1) Amount Code	(2) Type	(1) Value Code	(2) Value Method Cod	
RETIREMENT ACCOUNTS AND PLANS AND CASH VALUE OF LIFE INS					
CARDIOLOGY ASSOCIATES PROFIT(S) SHARING PLAN #14301-02 Texas Commerce Bank, Corpus Corpus Christi, Texas	-	NONE	O	T	EXEMPT
CARDIOLOGY ASSOCIATES MONEY (S) PURCHASE PENSION PLAN ACCOUNT #14300-02 Texas Commerce Bank, Corpus Corpus Christi, Texas	-	NONE	O	T	EXEMPT
BANK OF AMERICA INVESTMENT SAVINGS, INC. P.O. Box 619005 Dallas, Texas 75261-9005	-	NONE	J	T	EXEMPT
IRA #45-026017-1 (S) IRA #45-025970-2	-	NONE	K	T	EXEMPT
PUTNAM U.S. GOVT. INCOME TRU IRA #46355894 (S) IRA #46355907	-	NONE	K	W	EXEMPT
FARM & HOME LIFE INSUR. CO. 300 W. Osborn Road P.O. Box 16170 Phoenix, Arizona 85011 IRA annuity contract #506400	-	NONE	K	W	EXEMPT
CASH VALUE OF LIFE INSUR: MUTUAL OF NEW YORK MUTUAL OF NEW YORK MASSACHUSETTS MUTUAL LINCOLN NATIONAL LIFE INSUR. C LINCOLN NATIONAL LIFE INSUR. C AMERICAN NATIONAL INSURANCE CO	C	6	K	W	EXEMPT
USAA LIFE INSUR COMPANY	A	6	J	W	EXEMPT
MUTUAL OF NEW YORK	A	6	J	W	EXEMPT

NOMINATION OF THOMAS A. CONSTANTINE, TO BE ADMINISTRATOR, U.S. DRUG EN- FORCEMENT ADMINISTRATION

WEDNESDAY, MARCH 2, 1994

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:04 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee), presiding.

Also present: Senators Hatch, Thurmond, and Grassley.

OPENING STATEMENT OF CHAIRMAN BIDEN

The CHAIRMAN. The hearing will come to order.

Let me begin by welcoming my colleagues from the House and the Senate and tell them how we are going to proceed.

I have a brief opening statement, as Senator Hatch does. He has another meeting at the moment. He will be here. If he is here in time to make his statement, we will move to him. Then I will invite the Senator from New York, my good friend, Pat Moynihan, to make his introduction. And I am told that Senator D'Amato may be here and our colleagues from the House, and I appreciate their coming over.

Today the Judiciary Committee considers the nomination of Thomas Constantine to head the U.S. Drug Enforcement Administration. The next head of DEA will have a unique opportunity to influence the shape of our Nation's response to illegal drugs. The reason I say that is the Clinton administration has recently proposed a comprehensive, I believe, and smart and different national drug strategy than we have been following the last couple of years.

We have learned, I hope, from the last several years—and I do not say this by way of criticism—some of the things that work and some of the things that do not work. Hopefully we are in the process of discarding what does not work, sticking with what works, and trying new things that, quite, frankly, we are not sure how well they will work.

The strategy, finally, puts the Federal Government's commitment behind the goals that some of us have long believed were essential to effectively fight drugs and drug-related crime: More Federal aid to State and local enforcement; a focus on hard-core addicts and not just on first-time users; treatment backed up by certain punishment for all drug users who commit crimes; enhanced treatment to reach more of the over 1 million treatable hardcore addicts, who,

I might add, commit about 200 crimes a year each; a controlled shift from ineffective interdiction programs to promising efforts in source countries; and drug education for every child in America.

As the distinguished Senator from New York, Senator Moynihan, knows—and I am not being facetious when I say this—there is little I think I know that I do not later learn that he has known it before I knew it. I remember one day talking to him about this being the second drug epidemic, and he said, “Yes, remember the first drug czar, a guy name Anslinger, who did such-and-such?” Well, as he can tell you and as all of us have come to know, this is not the first drug epidemic we have had in America. At the turn of the century, we had an epidemic where on a per capita basis as many people were consuming what are now controlled substances as are consuming now. And we used our heads a little bit then. By the late 1920’s, we did not have a drug problem in America.

It is interesting for me to note that in 1924 there were more States in the United States of America that had grades 1–12 drug education programs in the public schools than exist today in the United States of America. So there are answers out there if we just get a little smarter about them.

That is why I say, Mr. Constantine, you are moving into this position at a time when the DEA is going to be striking out in some new areas. Obviously, enforcement is their business, but I think there are some changes in the works.

These steps, I hope, will enable us to pursue a two-pronged attack: First, to treat existing addicts and stop drug-related crime that they are now committing; second, to attack the future root of the drug epidemic, the future root being our children.

Now that the Nation has more advanced antidrug strategy—I believe it is more advanced—we must work together to turn it into action. First, we have to enact the crime bill, which contains \$9 billion to expand prevention and drug treatment programs and funding for 100,000 new police officers for community policing.

Second, it seems to me we have to pass a drug bill, the drug bill which I will introduce later this year that moves even further to close the treatment gap, to reach all children with education prevention programs, and to fully fund medications development programs, another thing my friend from New York had put me on to, one of the most promising hardcore treatment efforts that is under way.

Third, the administration must continue to adjust the allocation of drug-fighting resources so that our resources are spent on programs that work. And it must continue the efforts begun by FBI Director Freeh to improve coordination between the Federal agencies, between the Federal Government and State and local law enforcement.

Finally, if we are to win the fight against crime and drugs, we must move beyond what we traditionally think of anticrime and antidrug efforts to necessary efforts and necessary reforms to the very infrastructure of our society which suffer from serious decay at critical points. Health care, welfare reform, education, jobs—to all of these we must commit our resources and our most innovative ideas to make an investment in our future, which is, obviously, the children of America.

We are still at the first stage of this effort, but this nomination is an important part of the administration's plan to put an effective team in place to run this strategy. To join Drug Director Brown, Attorney General Reno, and FBI Director Freeh, we could not have a finer candidate than Thomas Constantine. I have had the pleasure of working with this nominee over the years, and I am truly impressed with his abilities, truly impressed with his record, and truly impressed he would be willing to take this job.

His current position as superintendent of the New York State Police caps a 30-year career in State and local law enforcement. The New York State Police is one of the Nation's largest police departments. In fact, with 4,000 officers, it is larger than the DEA, which has 3,600 agents. Without question, Superintendent Constantine brings with him the strong management skills needed at the DEA.

In addition to the vast record of law enforcement successes, he brings with him specific experience in drug enforcement. Having implemented the community narcotics enforcement teams in New York, these teams of State troopers were deployed to small cities and towns throughout the State to help combat local drug dealers.

Superintendent, I welcome you here today, and I look forward to the discussion with you on how we can turn a comprehensive strategy which we are now beginning to implement, hopefully, into action and into success.

[The prepared statement of Senator Biden follows:]

Today, the Judiciary Committee considers the nomination of Thomas Constantine to head the United States Drug Enforcement Administration.

We could not have a finer candidate than Thomas Constantine—whose current position as superintendent of the New York State Police caps a 30 years career in State and local law enforcement.

The New York State Police is one of the Nation's largest police departments—in fact, with 4,000 officers, it is larger than the DEA (which has 3,600 agents). Without question, Superintendent Constantine brings with him the strong management needed at the DEA.

In addition to a long record of law enforcement successes, he brings with him specific experience in drug enforcement—having implemented the community narcotics enforcement teams in New York, helping small cities and towns throughout the State combat local drug dealers.

At the Judiciary Committee hearing on his nomination, Superintendent Constantine offered his clear commitment to being an aggressive leader in the fight against drugs, he offered his commitment to keeping State and local law enforcement as a key partner with the DEA, and he testified that he would do everything he could to combat the "turf wars" that have long hampered the Federal drug enforcement effort.

Superintendent Constantine is well qualified to lead the DEA, and I urge the committee to support his nomination.

Chairman BIDEN. With that, since my friend is not here, let me yield to the distinguished—Chuck, would you like to say something?

Senator GRASSLEY. I have no opening statement. I welcome our guest and congratulate him.

The CHAIRMAN. I will yield to the distinguished Senator, the man who, as I said, knows more about just about everything that there is to know than anybody in this outfit, Pat Moynihan. Pat, welcome.

**STATEMENT OF HON. DANIEL PATRICK MOYNIHAN, A U.S.
SENATOR FROM THE STATE OF NEW YORK**

Senator MOYNIHAN. Thank you, Mr. Chairman.

Let me take just a moment to continue a conversation you and I have had for 18 years on this subject and which is culminating, or at least making a very important moment in the drug bill you are going to be introducing very shortly. My colleagues, Senator D'Amato, Mr. Quinn and—

The CHAIRMAN. We can keep Senator D'Amato waiting for a simple reason. His son and my son are roommates in law school, and I am not sure who is responsible for the other, but we get to talk a lot. So you go right ahead. [Laughter.]

Senator MOYNIHAN. We do not have a chance to say something like this very often. Just to pursue the line of inquiry you were making, I will first of all say that the first drug epidemic we had in this country was not the early 20th century when we had Anslinger and all. It was immediately after the Civil War. And when we use the word drug, it just is so important to keep clear we are talking about drugs in the terms that we speak of drug stores. These begin as medicines. They originate with the development of organic chemistry in German universities in the early to middle part of the 19th century.

The particular combination of medicine and technology came in the late 1840's when morphine was developed out of opium, and the hypodermic needle. And apart from the surgeon's saw, that was the only medicine they knew in the Civil War. In the aftermath, persons deeply addicted—if that is the word—to the use of morphine were said to have "soldier's disease."

It got into medical usage in childbirth, for example, and by the turn of the century, there were just a very great many mothers, women, who became addicted in that mode. Eugene O'Neill's "Long Day's Journey Into Night" speaks of his mother who was once such a person.

Part of this problem is that doctors have been scared of the subject and have avoided it, have been averse. Heroin is a trade name. The people who developed heroin are the same Bayer aspirin people; the Bayer Co. developed aspirin. Aspirin is a trade name. You can see advertisements for heroin in the Yale Alumni News. They tried it on their employees, and it made them feel heroic. Heroin.

Cocaine developed the same way, and Sigmund Freud's first publication, "Uber Coca," described his use of cocaine to treat a morphine addiction, which he found induced a psychosis and he did not like it.

But that has meant we have, by and large, turned this problem over to law enforcement officers, and in the main, sir, they cannot do anything about it. That is why I admire, not just because of his own personal qualities, Mr. Constantine; I admire him for who he is and also for what he is doing.

I have a chart here. We are now in the middle of something that historians are already developing data on, the onset of the most recent heroin epidemic, or maybe the one before the present. Here is a chart. You cannot see it, but I can just tell you about it, and you can follow it, sir. This traces homicides per 1,000 in the United

States and New York City from 1900 to now. New York City is always just a little below the national trend, but right with it. And in 1900 almost nobody got shot. You know, 2 per 100,000 in New York City and 3 in the Nation.

It grows and goes up and up and up until the stock market crash we were about 10 per 100,000. Then comes poverty, unemployment, all those things, and, of course, homicides go down. And then the prosperity, if you will of the war, they keep going down for quite a while. And even in wartime it does not do anything but a peak.

Then 1960 comes, and suddenly, in a pattern we see in a lot of statistics, the New York City curve, which is below but follows the trend of the Nation, breaks right through it, and you have homicides per 100,000 of 30 in New York while you are still 10 in the Nation. That was the onset of heroin. You could feel it in New York City in 1959 and 1960. There just was no question about it.

We have never developed a treatment, and it is simply a rule that enforcement, attempting to keep drugs out of the country, is necessary. You have to make that effort. But you have to know that it will not succeed. It will not change anything. If you think that, then you are thinking something that is not so. If you say it knowing it is not so, you are lying. And you are not in that business.

Just to make one point, in the Antidrug Abuse Act of 1988, as one of our specific statements—and I wrote this language—it said the purposes of the act, section 2012, No. 5 is to increase to the greatest extent possible the availability and quality of treatment services so that treatment on request may be provided to all individuals desiring to rid themselves of their substance abuse problem.

I wrote "treatment on request" because "treatment on demand" sounded a little too imperious, like payment on demand. The bank has your money, and they have to give it to you.

I wrote in there under this new arrangement we had a "drug czar," Deputy Director for Supply Reduction and Deputy Director for Demand Control. That statute, sir, has made no difference of any kind. The Federal Government is in wholesale contempt of the Congress and the law. But they do not know that.

The CHAIRMAN. They do now, Pat. The budget they introduced does respond to what you have just said.

Senator MOYNIHAN. I think, sir, they are responding more to you than to me, but I have said all I want to say except to introduce in the record, if I may—I am at that age when either you speak at the funeral or you give the memorial lecture. And there was a great teacher, Norman Zinberg, at the Harvard Medical School, whose work "Drug, Set, and Setting" is the basic study, and I gave the lecture. It is called "Iatrogenic Government: Social Policy and Drug Research." Iatrogenic is a Greek word, obviously, for illnesses induced by doctors. We have here an illness induced by doctors, and social policy compounds it.

I would respectfully ask to put it in the record.

The CHAIRMAN. Without objection, it will be placed in the record. [See lecture under submissions for the record.]

Senator MOYNIHAN. And possibly also this chart, which is pretty striking stuff. If you want to see an epidemic in two lines, it is by

Prof. Eric Monkkonen of the department of history of the University of California at Los Angeles.

The CHAIRMAN. Without objection, that will be placed in the record.

[See chart under submissions for the record.]

Senator MOYNIHAN. I have gone on long enough. You have been very generous. I have not said a word about the superintendent because his record speaks for itself. You yourself have said so, sir. I commend him to you with the greatest sense of honor that New York has produced such an office, and I wish him the best of luck.

The CHAIRMAN. Thank you, Senator, and thank you for your truly enlightened input throughout this whole process.

Senator THURMOND. Mr. Chairman, I have a very important hearing within the Armed Services Committee, and I just want to say that I have studied the record of Mr. Constantine, and I think he is well qualified, and I will be glad to support him.

The CHAIRMAN. Thank you very much. And, superintendent, that is worth its weight in gold.

Senator MOYNIHAN. You made it.

The CHAIRMAN. Congratulations. You have just been confirmed. We can adjourn the hearing. [Laughter.]

There is not a lot of sense to go on anymore.

Thank you very much, Pat.

Now, a man who has also spent a good deal of his public career trying to deal with this problem of drug abuse in the country, and a good friend, Senator D'Amato.

STATEMENT OF HON. ALFONSE D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Thank you very much, Mr. Chairman. I am going to ask that my full statement be placed in the record as if read in its entirety.

The CHAIRMAN. It will be.

Senator D'AMATO. Let me simply say that Tom Constantine has done a great job in the 32 years of his career with the State police, the last 7 as superintendent. I think if one were to look at the record in terms of the kinds of efforts that he has made you could not help but be impressed. He has increased efforts not at just the street-level pushers, which are the easiest—you could fill up all the jail cells and not make any dent in the crime that Senator Moynihan has spoken about or the statistics—but he has really been involved in dealing at the highest levels, whether it be Interpol or dealing with the DEA.

In 1990-91, under his direction the New York State Police were responsible for seizing, over \$100 million of—and, you know, they always say go to the money—from the drug dealers in the way of money, personal property, et cetera. He has an unblemished record and has been a great steward of this effort.

When we talk about policy, as Senator Moynihan has indicated, we obviously need a coordinated one in terms of law enforcement efforts both here and on the international side, as well as in the education, prevention, and the treatment fields.

As it relates to understanding this and to being second to none in terms of the law enforcement effort and having the ability to co-

ordinate local, State, and Federal efforts, there is no one who comes better equipped.

And let me say something else. In the years that I have been in Government, with all of the politics, pushing, pulling, who gets credit for what, seizures, you know, who gets to beat their chest—and that happens; I do not care what State, what jurisdiction—that has never taken place with Tom, with his department, on his watch. His has been doing the business of the people, taking on the important tasks of providing safety for our people first.

This is a great nomination, and I certainly support this nomination from the President. I look forward to working with him and toward his speedy confirmation.

[The prepared statement of Senator D'Amato follows:]

PREPARED STATEMENT OF SENATOR D'AMATO

Mr. Chairman, I would like to thank you for the opportunity to come before the Judiciary Committee to introduce New York State Police Superintendent Thomas Constantine at his confirmation hearing to be Director of the Drug Enforcement Administration.

Thomas Constantine has spent the last 32 years of his life in law enforcement with the New York State Police, the last 7 years as Superintendent. He has served on the Organized Crime Task Force, operated in undercover drug operations, and written numerous articles on drug policy. Most importantly as Superintendent he has intensified the fight against drugs in our State.

Thomas Constantine understands what this country is up against. He understands the war on drugs and the crime that goes with it. With the drug cartels finding ever more ingenious ways to bring drugs into this country, we need imagination and dedication to combat this scourge facing us. Under Tom Constantine's leadership, the New York State Police Narcotics Unit of 350 personnel has proven its dedication to fighting the drug war by seizing over \$100 million in currency, property, assets and vehicles, during 1990-91 alone.

Under his leadership, the New York State Police have taken on the drug cartels and the street-level pushers, combatting crime and violence on the streets. Through undercover operations there have been investigations that have led to major seizures and indictments of major cartel members.

During his command, the New York State police have expanded their work to trace serial murderers, combat computer crime, trace firearms, and strengthen the INTERPOL liaison program.

The Drug Enforcement Agency has a tough battle ahead. The Administration's altered priorities coupled with the changing budget situation means that the drug fight will change. Regardless of the focus, the DEA will continue to lead the charge and continue its effort to end the blight of drugs in our nation. Tom Constantine has the experience, the knowledge, and the fortitude to conduct this drive. I have every confidence in him, and I am sure that he will perform admirably in the office of Director of the Drug Enforcement Agency. Thank you Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator MOYNIHAN. Sir, I have to be on the floor.

The CHAIRMAN. Yes, and as you leave, Pat, the report to the Nation on crime and justice, the U.S. Justice Department, Bureau of Justice Statistics, has the other half of your chart as it relates to the Nation. Although it only goes up to 10.5 per 100,000, it has the same curve.

Senator MOYNIHAN. That same dip, yes.

The CHAIRMAN. Same curve, same dip, and up.

Senator MOYNIHAN. We are learning something.

The CHAIRMAN. So it is a consequence of what you said.

I thank you both. I know you have other duties. You are welcome to stay, obviously. You are welcome to join us here if you would like, but I know you have other duties.

OPENING STATEMENT OF SENATOR HATCH

Senator HATCH. If I could just say a few words, I want to welcome you, Mr. Constantine, to the committee. I have reviewed your record. It is a terrific record, and I was happy to have Senator Thurmond's directions to all of us. I intend to fully support you in every way. That is not just for confirmation, but as the head of DEA, because we think it is a very important agency.

If I could just say that I raised major concerns with the proposed merger that the administration was going to put through last year because I felt that that would be used to hide major cuts to Federal law enforcement. To me that is a very great concern because my prediction about cuts to the Federal law enforcement have been proven correct since that time.

The fiscal year 1995 budget cuts 1,523 Department of Justice law enforcement agency positions, and according to the Justice Department budget summary, the FBI loses 847 positions, the DEA loses 355, the Department's Criminal Division loses 28, the Organized Crime Drug Enforcement Task Forces lose 150, and Federal prosecutors lose 143 positions. This is going to make your job even more difficult if we keep going in that direction.

Even absent these cuts, there are still 431 fewer FBI agents and 202 fewer DEA agents today than there were in 1992. Not a single new agent has been hired by either the FBI or the DEA since President Bush left office. None, according to the President's budget, will be hired until at least 1996.

I have problems with that because at a time when violent crime and drug control are said to be national priorities, these cuts are going to reduce the effectiveness of Federal law enforcement and make your job even more difficult. And the President's budget acknowledges this.

I have to empathize with the President, too. He is trying to cut wherever he can to keep costs down, but they are increasing in other areas that are not nearly as important as this. And they should not be cutting in this area and increasing in other, less important areas.

The administration's own budget figures reveal that Federal prosecutors will be filing 527 fewer criminal cases in fiscal year 1995. The Organized Crime Drug Enforcement Task Force Program, cut by over \$12 million, will investigate, indict, and convict fewer criminals. Indeed, former Deputy Attorney General Philip Heymann confirmed this in a recent article he wrote. He said, "With fewer Federal investigators and fewer Federal prosecutors in the years ahead, there will not be more Federal law enforcement but less."

Now, given this lack of commitment to drug and crime war, you face an uphill battle when confirmed. There is clearly a need in this country for fiscal restraint, but a budget of \$1.5 trillion, it seems to me we have got priorities that have to be met. And they are not being met in that budget.

Now, cutting Federal criminal law enforcement positions in addition to cuts in prison construction and cuts to drug interdiction efforts, at least in my opinion, is an unwise choice, especially in light of our Nation's serious drug problems.

I think we are losing ground. The National Household Survey of Drug Use has recently been released. That indicates that the casual use of marijuana, LSD, and inhalants has increased among our young people. Perhaps more ominously, the survey shows that the perceived risks of drug use has declined substantially, meaning simply that our young people are getting the wrong message about drugs. I think we have got to send them the right message, and to do that we have got to have highly visible Presidential leadership and we have got to have a strong DEA Administrator.

Now, I have every confidence in you, having read what you have done, how you have lifted yourself up by the bootstraps, how you went to school on your own after hours, how you attained all these educational standings. Frankly, you are going to have to really take charge and be very aggressive, or we are going to lose a lot of ground here compared to what we have lost in the past.

I just want you to know that when you are confirmed, I know that both Senator Biden and I will work very closely with you and do everything we can to help you. Senator Biden has been a leader in this area for years and, frankly, will continue. I have no doubt about that. And I certainly will give every effort I can to it as well and try and give you the backing and the help that you need.

Senator I would like to put my full statement in the record, and I will let it go at that.

The CHAIRMAN. Without objection.

[The prepared statement of Senator Hatch follows:]

PREPARED STATEMENT OF SENATOR ORRIN G. HATCH

Mr. Chairman: I want to welcome Thomas Constantine to the Judiciary Committee. If confirmed to be Administrator of the Drug Enforcement Administration, Mr. Constantine will be overseeing the operations of 3,400 agents charged with leading our federal war against illegal drugs. This effort is of vital importance to the people of Utah and other states. I am concerned that federal agencies here in Washington fail to respond adequately to the rising drug and crime problem in rural America. Utah is not only a transshipment point with drug dealers running drugs through Utah; more and more are staying in the state. I will want to hear how Mr. Constantine plans to address the problems of rural states.

Superintendent Constantine has the administrative experience necessary to fill this important position. As the Chief Executive Officer of the New York State Police, he directs the operation of one of the largest police departments in the United States. I should mention that he was the first Superintendent to be appointed from the ranks in over thirty years.

Since becoming Superintendent in 1987, Mr. Constantine has implemented a sophisticated anti-drug strategy that weaved together several major narcotics enforcement programs. His Department has targeted international cartels, investigated mid-level narcotics groups, and has made it a priority to target street-level dealers and shut down open-air drug markets.

This commitment to fighting the drug trade at every level is to be commended. All too often, law enforcement centers its efforts on major drug rings and, in the process, ignores open-air drug markets. In my view, relinquishing ground to the street-level dealers is tantamount to sanctioning the crime and sends a mixed signal about our nation's resolve to fight this problem.

More recently, Superintendent Constantine chaired the International Association of Chiefs of Police Violent Crime Summit which produced a comprehensive report. Several of this report's recommendations were made a part of the recently passed Biden-Hatch crime bill.

If confirmed, Superintendent Constantine will be taking over the reins of an agency that will need to be aggressively represented within the Clinton Administration. I commend Judge Robert Bonner for his steadfast leadership of the DEA over the past several years. Thanks to his efforts and those of some of us in Congress, Clinton White House proposals for the elimination of the DEA were withdrawn. Furthermore, Judge Bonner oversaw the expansion of the DEA's size and strength to the

point where DEA is the considered the world's preeminent narcotics enforcement agency. The agency has made great strides against narcotics, both domestically and internationally.

One would think President Clinton supports a strong anti-drug law enforcement policy. In unveiling his drug strategy, President Clinton announced "the strategy's new emphasis on . . . treatment in no way signals a diminution of an aggressive role for law enforcement agencies—in concert with their state and local counterparts—to disrupt, dismantle, and destroy drug trafficking organizations." Yet, despite the power of these statements, the Clinton Administration's drug budget and policies contradict this rhetoric. Indeed, when it comes to federal law enforcement, it is as if the Administration is asking the American people to listen to what they say, but not watch what they do.

When the White House proposed DEA's merger into the FBI last year, I raised concerns that the merger could be used to hide major cuts to federal law enforcement. My predictions about cuts to federal law enforcement have been proven correct. The FY 1995 budget cuts 1,523 Department of Justice law enforcement agency positions. According to the Justice Department budget summary, the FBI loses 847 positions, the DEA loses 355, the Department's Criminal Division loses 28, the Organized Crime Drug Enforcement Task Forces lose 150, and federal prosecutors lose 143 positions. Even absent these cuts, there are still 431 fewer FBI agents and 202 fewer DEA agents today than there were in 1992. Not a single new agent has been hired by either the FBI or the DEA since President Bush left office; none, according to the President's budget, will be hired until at least 1996.

At a time when violent crime and drug control are said to be national priorities, these cuts will reduce the effectiveness of federal law enforcement, and the President's budget acknowledges this. The Administration's own budget figures reveal that federal prosecutors will be filing 527 fewer criminal cases in FY 1995. The Organized Crime Drug Enforcement Task Force Program, cut by over \$12 million, will investigate, indict, and convict fewer criminals. Indeed, former Deputy Attorney General Philip Heymann confirmed this in a recent article he wrote: "With federal investigators and fewer federal prosecutors in the years ahead there will not be more federal law enforcement but less." [Washington Post, February 27, 1994]. These plans let down the American people.

Given this lack of commitment to the drug and crime war, Superintendent Constantine faces an uphill battle if he is confirmed. There is clearly a need for fiscal restraint. But in a budget of \$1.5 trillion, priorities can and must be met. Cutting federal criminal law enforcement positions, in addition to cuts to prison construction and cuts to drug interdiction efforts, is an unwise choice, especially in light of our nation's serious drug problem.

Due to the lack of strong leadership from this Administration, we risk losing ground. The National Household Survey of Drug Use has recently been released. The survey indicates that casual use of marijuana, LSD, and inhalants has increased among our young people. Perhaps more ominously, the Survey shows that the perceived risks of drug use has declined substantially, meaning simply that our young people are getting the wrong message about drugs. We have to send them the right message. To do this, we need highly visible Presidential leadership and a strong DEA Administrator. Without the strong leadership of the President and without an aggressive DEA, we will continue to lose ground.

If he is confirmed, I will work with Superintendent Constantine in continuing the fight against drugs. Through a sustained effort on the part of the Administration and the Congress, I believe we can make up the ground we have lost over the past year and make progress in fighting drug abuse and drug related violence throughout all of America.

The CHAIRMAN. Gentlemen, it is a long road. They say the longest walk is from one side of this building to the other, although I think it is longer walking down Pennsylvania Avenue. Let me thank you for coming over and thank you for your indulgence in waiting so long.

Representative McNulty, we are happy to have you here. You have represented New York's 21st District in the House since 1988. I understand that encompasses Albany. If I think I had problems, how would you like to have Mario Cuomo as one of your constituents? [Laughter.]

Welcome, Representative, and the floor is yours.

STATEMENT OF HON. MICHAEL R. McNULTY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. McNULTY. Thank you, Senator Biden, Senator Hatch. You have heard from our two Senators, and you have heard a very strong, bipartisan endorsement of this nomination. That continues now with the Representatives in the House.

Jack Quinn and I may have a little tug-of-war in claiming who actually represents Tom and his family because Tom is originally from Jack's part of the State, but he currently lives in the 21st District, and I am very proud of that.

When Attorney General Reno called and advised me of this nomination, I could not have been more delighted. As you may know, Senator, I am the son of a former sheriff, and Tom began his career as a deputy sheriff out in Erie County. So he is my kind of person.

He began his career in the State police in 1962 and rose through the ranks until he became superintendent in 1986. You may be interested in knowing, Senator, that the number of people employed by the New York State Police, including all employees, is closer to 5,000 than it is to 4,000.

Additionally, I had the opportunity to work with Tom not just in my capacity as a Member of Congress, but before my service in Congress, I was a member of the New York State Legislature and worked with him there as well.

I can tell you without hesitation that, of the many nominations which you confirm in this committee, this is one which you will never regret. His background you know well. I want you also to know that he comes from an outstanding family and has an outstanding family himself. Almost all of them are here today, and I just want to say that I am delighted to be here with Tom and Ruth and the children, one of whom has followed in his dad's footsteps in law enforcement and is a veteran member of the Niskayuna Police Department in my district, and to say that I think all of the citizens of New York are very proud of him, and I think we are fortunate for the citizens of this Nation to have someone of Tom's caliber willing to take on this very tough assignment.

The CHAIRMAN. Thank you. Thank you very much.

Representative Quinn, you represent New York's 30th District, the Buffalo area, as I understand it. Do you actually take most of Buffalo in?

Mr. QUINN. Almost all the city, Senator.

The CHAIRMAN. We welcome you, and thank you very much for taking the time to be here.

STATEMENT OF HON. JACK QUINN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. QUINN. Thank you very much, Senator, Senator Hatch. I am pleased to join with my colleagues and you this morning and Tom and his family in coming before the committee. If you think it is tough having Mario Cuomo in your district, you ought to have the Buffalo Bills in your district. [Laughter.]

Tough four seasons, Senator.

Senator HATCH. We were all pulling for you.

Mr. QUINN. Yes, well, thank you.

The CHAIRMAN. And we will pull again next year for you.

Senator HATCH. Yes, we have a feeling you will make it back.

Mr. QUINN. As you know here, I am a freshman Member on the Hill and took some good-natured ribbing. The joke on our side was: You know who is going to win the Super Bowl? The answer was: Whoever plays the Buffalo Bills. [Laughter.]

Nonetheless, Tom, they are there, and you are here today. Prior to being a freshman Member in this body, I was a town supervisor in the town of Hamburg and had the opportunity to work with Tom on a number of projects over the years during my 10 years as a town supervisor. And you know his record and you have heard others speak about Tom this morning and his dedication and his hard work.

I want to add to that record today the fact that in Tom Constantine we have a gentleman who gets the job done, and his background in local police endeavors, his background on the State level, keeps close in his mind people on the street, the people back in our districts, the men and women who live in neighborhoods across this country who need help so desperately when it comes to law enforcement.

Senators, in my judgment, there is no better candidate to lead the Federal agency responsible for enforcing narcotics and controlled substance laws and regulations. I am certain that when we finish these proceedings, you will all agree and the country will agree, and I am happy to add my voice, Tom, to all the others that will speak in introducing you here this morning.

Thank you.

[The prepared statement of Mr. Quinn follows:]

PREPARED STATEMENT OF JACK QUINN

Mr. Chairman, I am honored to have the opportunity to set before this Committee this morning and to have the privilege of introducing my friend and former constituent—New York State Police Superintendent—Thomas Constantine.

I couldn't be more pleased that Tom was nominated by President Clinton to serve as the Director of the Drug Enforcement Administration (DEA).

Since he entered the New York State Police Academy in 1962, Tom has served as an exceptional leader in law enforcement and has certainly left his mark. From his initial service as a New York State Trooper in Buffalo to his tenure as Superintendent, Tom has illustrated his commitment to narcotics investigations.

In fact, New York State has more personnel dedicated to the "war on drugs" than any other State law enforcement agency in the country. The Superintendent oversees several outstanding statewide programs such as The Law Enforcement Awareness Resource Network (LEARN) whereby troopers teach 5th and 6th graders the anti-drug abuse message.

In my judgement, there is no better candidate to head the lead federal agency responsible for enforcing narcotics and controlled substances laws and regulations. I am certain that after these proceedings, you will agree.

Therefore, Mr. Chairman, Senator Hatch, and other distinguished Members of this Committee, it is my pleasure to join my colleagues to introduce Superintendent Thomas Constantine.

I want to wish Tom and his family well. I know he "gets the job done". Our part of the job is to give Tom the tools he needs.

The CHAIRMAN. Thank you very much, Representative. If my mother, Jean Finnegan Biden, were here, she would say to me, "What is a handsome, nice Irish boy like that man being a Republican?" But I will ask you about that later.

Where I come from, you are not allowed to be Irish and a Republican. Would you note that no one laughed, but it was meant to be a joke. I was only kidding. [Laughter.]

I do not want to get letters about Biden saying there are no Irish Republicans. I realize there are a lot of Irish Republicans.

Mr. QUINN. Thank goodness.

The CHAIRMAN. Thank God they vote Democrat in Delaware, though.

Now, Tom—excuse me, Superintendent. I should not be so familiar with you. I am about to ask you to stand to be sworn. After that, I would like you to take the time to introduce your family, which we have all heard so much about, and do what all of us in public life do. Occasionally we have to embarrass our children by making them stand to be recognized. Would you stand first to be sworn?

Do you swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. CONSTANTINE. I do.

The CHAIRMAN. Please be seated, and would you please introduce your family to us?

Mr. CONSTANTINE. Let me get everybody straight here in the right sequence. As you will see, as I introduce the children and everything and as you hear a little bit about my career, you are going to see the person who is responsible for most of these successes—my wife, Ruth, who is here—because I was really away a great deal of the time, and she kept everything together when it was very rocky times and not a lot of money, as you can see.

My youngest, 13, is Laura. She is a seventh grader at St. Helen's School in Schenectady. My son, Kevin, and his wife, Kathy; their young son, Shane, is at home.

Let's see if I can get everybody over here now. My daughter, Kathleen, who is a teacher; my daughter, Patty, and her husband is home watching their 5 children. If they were here, we would all have our hands full, I guarantee you.

My son-in-law, Jeff, and my daughter, Lisa, who is a court reporter; and last, certainly not least, is my son, Tom, who is a policeman with the Niskayuna Police Department.

I think when you see the size of the family and—

The CHAIRMAN. And we can tell by the haircuts who has what job. [Laughter.]

Mr. CONSTANTINE. And the college bills, that may explain the relative paucity of my net worth statement that you may have looked at.

The CHAIRMAN. Believe me, I understand that. I had the dubious distinction 2 years of being listed as the poorest man in the U.S. Congress. My wife called me when she read that headline. I was speaking in Vermont. This is the God's truth. I said, "Hello, honey, how are you?" She said, "Fine." I said, "What's the matter?" "Nothing." I said, "Are you sure? Is it Ashley?" "Nothing." And there was silence. She said, "Did you read this morning's paper?" I said, "No, they don't deliver it in Vermont." She said, "Well, the headline, let me read it to you: 'Biden: Poorest Man in Congress.' Is that true?" Unfortunately it was. So I understand.

Now, let me ask your wife to stand. Would you stand so we could all see you? Thank you very much. [Applause.]

I mean this sincerely when I say this to Mrs. Constantine. Thank you very much for supporting your husband in doing this job. I realize taking this on and moving is not an easy thing, and I truly mean it. Thank you very much for being supportive of this.

Do you have an opening statement at all, Superintendent, that you would like to make? And you gentlemen are welcome to join us up here, if you would like, or you can remain there, or you can obviously do whatever you want to do. But you are welcome to join us if you would like.

**TESTIMONY OF THOMAS A. CONSTANTINE, SCHENECTADY, NY,
TO BE ADMINISTRATOR, U.S. DRUG ENFORCEMENT ADMINISTRATION**

Mr. CONSTANTINE. Thank you both, Congressmen.

Very briefly, this obviously is a great honor for me. I told somebody when I went back home after I had met with a couple of the Senators, I hope this will be successful, but if it was not successful, it was just a thrill to see the types of things that I have seen already.

It is a little intimidating as you sit here and look up. I can tell you that. However, each of you has treated me with a great deal of dignity and respect for my present position as superintendent of the State police and the position that I am seeking.

I think if you get a sense of my background and my career, maybe that will explain some of the reasons why I would be interested in such a position, or at least accept it when people are interested in me. I know the first time that Senator Moynihan called me when I heard about it, he said, "I do not know why you would take a job like that." And I discussed it with my Governor before I even got to that stage, and he said, "Well, are you sure you really want to do that?"

After a while, I analyzed it and I sensed that all of the things that I have believed in for all of these years were really so important and problems that I see that are so serious with violent crime and drugs in this country. And I have a concern—and I am not an alarming—that absent some dramatic action on the part of all of us in society, it has all the potential to become a good deal worse.

You could not see the chart that I saw from Senator Moynihan, but I know those figures from memory. In 1960, there were 462 murders in our State of New York. There was no increase in the population of our State. And in 1990, there was almost 2,700 murders. The robberies went from 7,000, armed robberies, up to 120,000 armed robberies in the year 1990 in our State. All of that is causing us a tremendous price, I think, in society.

I think Senator Hatch mentioned I have been very fortunate. I grew up in I guess what they call limited economic circumstances now. I think they called it poor then, but it did not make any difference because everybody in the neighborhood, no matter what their color or whether they were Irish or Italian, which was pretty much a breakup of a black, Irish, and Italian neighborhood, all had the same limitations. And I think the reason that we were all successful is that all of us had parents that wanted us to succeed, and for many of us, it was the—my own parents, through discipline, which I have to tell you at times was frequent and painful, and the

nuns at St. Vincent de Paul School, who also had a controlling factor over all of our lives at that stage.

The CHAIRMAN. I still have dreams about them. [Laughter.]

Mr. CONSTANTINE. But it caused me at age 8 or 9 to become aware of narcotics. I grew up across the street from the biggest heroin peddler in the city of Buffalo, a fellow named Bernie McCall. I had the chance to arrest him later on at the Buffalo airport with a couple of pounds of heroin in the later 1960's. But, ironically, I used to play with his kids. One of the other kids that we played with, I was close with a fellow named Kenny McCarter. He had died of an overdose by that time. I couldn't help but think how ironic that here is Bernie McCall with all his flashy cars and his kid is playing with us, and one of them dies from a heroin overdose, and we later find out that he has been the big dope peddler, not only in Buffalo but in a number of southern cities, for a long time.

I had the opportunity, obviously, as you can, like many people in the late 1950's or early 1960's, to get into law enforcement. I have to tell you for people who did not have a great deal of money for college or to prepare their children, at that time law enforcement was kind of a mecca for people who wanted to succeed in life but really did not have any background. In the first class that I went in with the State police, there was 140 recruits. There was only one person there with a college degree, and we were convinced that he must be a spy from Albany because why would anybody take a job in the State police with a college degree for a 60-hour work week to live in a barracks for \$4,000 a year.

It has been the most remarkable 32 years that I think anybody could ever experience. I have seen every major event that has occurred in our State. I have been very fortunate in whoever passed those programs, if it is people who are presently in Congress or the Senate. In the late 1960's, there were funds provided for police officers to go back to school. I availed myself of that. I started off with an associate's degree, continued on to get a bachelor's, a master's, and all of my hours for the doctorate, including the comprehensive exams. But I have to tell you I have not done the dissertation. I have no plans of doing it in the immediate future given the jobs that I have had.

All of that was really a Government program that supported that for me. And a lot of times people are critical of Government programs, but I can tell you I am very thankful and I can recognize how others would be.

In my career, every position I had for the most part was in a front-line command position. I gravitated toward units that dealt with violent crime or narcotics, was the field commander in charge of all the police operations from 1983 to 1986. And then in 1986, I was selected by Governor Cuomo to be the superintendent of the State police. That happened much as this position has happened. I was not seeking the position of being the superintendent of the State police. I had the job as field commander, and I loved it, and I did not want to get in competition for the superintendent's job for fear that if I lost the competition, I would lose that job also. So I just kind of got out of that and wound up being selected by the

Governor. Once I got to the interview, I figured they were not going to fire me as field commander, so I felt more comfortable.

In my time as superintendent, as mentioned, we have put a number of programs in. I can tell you we really focused on three or four major areas. One was on violent crime. The figures are not only substantial into the increases, but what is happening is the solution rate for violent crime is plummeting like a rock.

We used to solve homicides 92 percent of the time. We are down nationwide to about 60 percent, and in many of our cities, including the District where we are today, we are well below 50 percent in solving those homicides. We have looked at those figures, looked at what was happening, and felt that if we could attract some people with good backgrounds in forensics and better solutions over these crimes that we may very well be able to improve the solution rate of the crime under the belief that if somebody kills somebody in 1994, my guess is if you do not arrest that person, it is very likely that they are going to murder more people in 1995 and 1996 and even further out-years.

We have done that. We have hired forensic consultants. We have behavioral profilers. We have become the leading agency in the United States for the solution of serial homicides. We arrested Arthur Sharcross. We arrested Mr. Rifkin on Long Island. We now have Louis Lent locked up in Pittsfield, MA.

Between those three people and a fellow named Nathaniel White, we have within the last year, year-and-a-half, closed out 40 serial homicides that traced back over years. And we are not sure with Mr. Lent exactly how many homicides may still be involved in his activities.

The next area that we looked to was in the area of narcotics, and New York, as mentioned, has always been an area where narcotics—I think because of the tremendous size of that city and a lot of people with limited economic means, it has always been a vulnerable market.

We have put together a number of programs. Obviously, the Governor has been very good in supporting us with personnel. The first level is a major investigation into what we call the Cali cartel investigation. We found out after DEA had done a great job of limiting chemicals going out of the country for manufacture in South America, what was happening is people from the cartels had moved into our State lock, stock, and barrel. And in a place called Minden, NY, which I can only describe as giving a new meaning to the word rural, about 50 miles from Albany, a whole cartel operation had moved into an abandoned farmhouse and set up a laboratory operation capable of making 18,000 kilos of cocaine a month. As would happen, they did not handle the ether properly and almost blew the top of the mountain off, and we found out that we had this huge problem.

We have since 1986 assigned as many as 40 people to this one cartel investigation, have seized 6 tons of cocaine, \$28 million in cash. We have indicted 200 major principals of the Santa Cruz Lindano Colombian cartel as they have operated within our confines of New York State or contacts with foreign nations.

The next level of our narcotics operation dealt with what we call mid-level. Many of our cities, Buffalo, Rochester, Albany, New-

burgh, we are watching as New York City drug gangs have started to move rapidly into these places, taking over the distribution of drugs, entering into a great deal of violence with the people in that community, whether they are residential gangs or not. We have focused on them, and we are finding that these people are now into Pennsylvania, Delaware, and Maryland, and I think on the west coast there are similar opportunities.

The last, which was mentioned, was a program where we send undercover troopers into cities, towns, or villages at the request of sheriffs, chiefs of police, or district attorneys. What has happened, as I know Congressman Quinn knows, in Buffalo we had a devastating situation in the fruit belt section, driveby shootings. They shot up the police station. It was just law run out of control with drug peddlers. Assemblyman Eve, who was in charge of that area for the State Assembly and a leader in the Black Caucus, came to me and asked me if I could do anything about it. It is my old neighborhood. We sent teams of undercover troopers in there, as many as 50 of them, culminating in a major raid with the arrest of 150 mid-level sellers and very violent people.

We then had the same problem in the city of Schenectady where this Congressman happens to represent. It is a city where I live. The driveby shootings are very close to my own house. We saw a tremendous problem that got out of control. We were told it was mostly New York City people. We found that to be true. And in a small city, a blue-collar city of 70,000 people, within 3 months we identified over 140 people who were selling drugs. I am talking about selling drugs at substantial levels in that small city. We brought 450 troopers and the local police one morning, arrested them all—without incident, thank heavens—and that was the next program that we were involved in.

Other programs which are not, I think, applicable at this stage of the game are things that we did in traffic safety. It is the one area that we can point to that we have been successful. We have dropped the fatal rate every year for the last 4 years. I attribute that to a group of women who started these programs in the late 1970's and got everybody's attention. And if you think citizens cannot have an impact, just look at what they have done with drunk driving.

The CHAIRMAN. You are absolutely right. It is incredible what the impact around the Nation has been. Incredible.

Mr. CONSTANTINE. If we could get the same reaction in violent crime and drugs, it would be a tremendous asset.

We have a strong affirmative action program, the State police, that we have spent a lot of money on. We think it has been positive. It has been good for the State police.

The CHAIRMAN. I would also argue, by the way, those that tell us enforcement does not work, that is an example of where the enforcement works.

Mr. CONSTANTINE. That is correct. No doubt about it. And I think people give up too easily, and that can be done.

Just to close, people say, well, why would you take this job? I have to disrupt my life. I just believe in it, and I think it is worth the challenge. I think I can bring something to it. I have a great

deal of experience, and I will work very hard for the Federal Government like I did the State.

Thank you.

The CHAIRMAN. Well, I thank you very much.

In the interest of time, in the first round we will limit ourselves to 10 minutes, and then give everybody a chance.

Let me start off by saying, superintendent, that the Senator from Utah and the Senator from Iowa and I have been friends and colleagues for a long time. We have gone through some very contentious nominations. We have been on the same side and opposite sides, and this is a real pleasure to have a nominee before this committee for such a very important post that has such overwhelming, broad, and deep support.

We have seen the bipartisan nature of that support that is welcome. It is not totally unusual for us to see that in this committee, but we pay a lot of attention to it. We truly do. We pay a lot of attention to what you guys have to say. It is not merely gratuitous having you here. You know the man, our colleagues in the Senate know the man, and we pay attention.

In addition to that, we also pay attention to groups that I personally have spent at least 19 years of my 21 years in the Senate working with closely, as I did with you when you were in the Troopers Coalition, and that is various police organizations. I am not going to list them all, but I am going to ask unanimous consent to place in the record the list of law enforcement organizations and former DEA Administrators who support the nomination, ranging all the way from NAPO to the National Sheriffs' Association, Troopers, Massachusetts Chiefs, New York Chiefs, Society of Special Agents, the Florida Department of Law Enforcement, California, the Board of Governors for Officials of Greater St. Louis, the former DEA Director from 1976 to 1981, Peter Bensinger, Frank Mullen, John Lawn, all former Directors, all not merely supporting you but enthusiastically supporting you.

[The list follows:]

LIST OF LAW ENFORCEMENT ORGANIZATIONS AND FORMER DEA ADMINISTRATORS
SUPPORTING THE NOMINATION

1. National Association of Police Organizations, Inc.
2. International Association of Chiefs of Police.
3. Past Presidents Committee, International Association of Chiefs of Police.
4. National Sheriffs' Association.
5. National Troopers Coalition.
6. National Alliance of State Drug Enforcement Agencies.
7. National District Attorneys Association.
8. New England Association of Chiefs of Police.
9. Massachusetts Chiefs of Police Association.
10. New York State Association of Chiefs of Police.
11. Society of Former Special Agents of the Federal Bureau of Investigation, Inc.
12. Police Benevolent Association of the New York State Troopers, Inc.
13. Florida Department of Law Enforcement.
14. Department of California Highway Patrol.
15. Board of Governors for Law Enforcement Officials of Greater St. Louis.
16. County and State Detectives Association of Pennsylvania.
17. Peter B. Bensinger—Former DEA Administrator, 1976–1981.
18. Francis M. Mullen—Former DEA Administrator, 1983–1985.
19. John C. Lawn—Vice President—Chief of Operations, New York Yankees. Former DEA Administrator, 1985–1990.

The CHAIRMAN. I have taken the time to ask why because, quite frankly, the mere fact that you ran—as important and as big and as significant as the New York State troopers are, it does not necessarily qualify you for this job. And so I asked these former DEA people why, and they tell me that you have real administrative skills. One of the things that I have observed in my working with you, because you and I as long as 10 years ago had—you showed up at a hearing I had in New York. You have been available to me and my staff. The thing that you seem to have, and I am going to ask you about it, is the ability to get organizations and individuals to work together who, by the nature of the organizations and the traditions of the organizations, tend to not work together.

The reason why about 10, 12 years ago I drafted legislation that has become known as the drug director—not the job you are being appointed to—was because I found, to my frustration—and you are aware of this—that DEA did not talk much to the FBI and the FBI did not like dealing with the CIA and the CIA dealt with no one. They are in another world. And I say that not critically. Sources and methods, as you know, to them is like—at any rate, the Coast Guard had trouble dealing with Customs. We actually had examples where one of those two agencies—and I do not want to start the fight all over again—literally, so the other would not be able to get their sources, purged their computer of the names of individuals that they had that they were targeting so that the other agency could not get access to them to be able to maybe make busts that they would not make.

I do not know how many times I heard your colleagues, when I would go meet with your present and former organizations, tell me how the DEA drove them crazy. They would come into town and think they were the new gunslingers in town, that the FBI always was smarter than the local people. Real resentment existed. A lot of that has been diminished, but a lot still remains federally. You have 31 Federal agencies that claim some jurisdiction over the drug enforcement issue.

There was a move to subsume DEA back into the FBI. Most of us in this committee made it pretty clear we did not think that was a good idea. But we have an opportunity now with another guy who I think is first-rate, a first-rate law enforcement officer with a first-rate mind—Louis Freeh—who I do not get the sense has any parochial interest in making sure that the FBI versus the DEA versus the whatever gets credit.

So what I would like to ask you in a generic form is: What do you see from the State level, looking at the Federal effort, are the problems that exist as you go into this job relative to coordination? I do not want you to talk as a DEA Administrator now. I want you to give me your experience as local. Now, New York is not local. It is the second biggest State in the Nation. It is gigantic. But it nonetheless is a State agency.

What kind of problems did you run into? And I am not looking for case specifics, names of cases. I want to get a sense of what you think your job is going to be and the kind of initiatives you think you are going to have to take in order to further coordinate the effort for the benefit of the citizens of this country.

Mr. CONSTANTINE. Well, I think coming from a little bit different background of law enforcement, especially at the State or local level, the idea of getting along with other police agencies—and everything is not sweetness and light. There are always egos and there are always people who have an agenda from time to time. However, when it is 3 o'clock in the morning and you have a bar-room fight and you are the only trooper on patrol, you do not really care what other agency shows up to save you at that point in time. And I think that kind of builds throughout your career of trying to deal with people.

Then as you become, I think, more sophisticated and you get more education and you get more experience, you realize that this is dysfunctional after a while, that it is never going to work. You wind up absorbing all of your attention either trying to protect your own interest somehow or attack somebody else's interest.

I think by and large at the State and local level, there is less of that overt dysfunctional competition. It still exists. There are still people that I know that will not talk to each other over stuff that I cannot figure out. For some reason, as you look up from State government to the Federal Government, you tend to see this stuff. You try not to get involved in it because it is not your business, and you do not want to pick sides. But I used to think that was kind of disappointing. Sometimes people who I respected greatly became involved in clashes, either institutional between the agencies or between personalities. I think there have been some improvements in that area, some that you have mentioned already.

I think that two major areas in Federal law enforcement are the FBI and the DEA. I have great respect for Director Freeh. He is not a personal friend of mine, but I had worked with him professionally when he was a prosecutor on criminal cases. I think he is a bright young man that if—and I hope he does—he sticks around for 10 years will make a very significant impact on American law enforcement.

I think that is an asset when both people respect each other, and that then causes within the agency, in my experience, if people on the top say, look, you know, let's keep this thing, this competition, where it is positive and within bounds and not negative and will not tolerate people working for them to lead them into bitter institutional conflicts, I have found that you can make some progress and changes in that way.

By and large, people who populate law enforcement agencies are very loyal to the system and very loyal to their bosses and will follow those types of directions.

We had some similar situations in our State where we had people in the State police would not get along with the sheriffs. They have concurrent jurisdiction. It is where agencies have concurrent jurisdiction where you find the friction.

The CHAIRMAN. And you are about to find that you have more concurrent jurisdiction with DEA—

Mr. CONSTANTINE. With everybody in the world, I think.

The CHAIRMAN. With the world, than you ever did as superintendent of the State police. Let me give you a specific example about the need to build cooperation to encourage more efficient and effective work among drug enforcement agencies.

I have been proposing—and some others as well—to combine the drug intelligence systems. In the past, I and others have documented the problems inherent when you have 19 separate and overlapping drug intelligence systems at the Federal level. Today there is a renewed effort that has been undertaken by Louis Freeh, acting in his capacity as Director, of the newly created Office of Investigative Policies. Now, that can turn out to be just another acronym that just further complicates things, or it can be the source of resolution of a serious problem.

In fact, the very first resolution issued February 2, 1994, of this office was to consolidate the Justice Department drug intelligence systems.

What are your views about the need to provide unified drug intelligence systems?

Mr. CONSTANTINE. Well, it is my understanding that I do not think that is going to be just another bureaucratic committee from my sense of the way they are attacking things very early in their formation. They have made three substantial decisions, it is my understanding, in the area of drug intelligence. One is to combine DEA and FBI and a pointer index that is referred to, things that I have dealt with for a long time with DEA called the NATUS System. They have also looked toward contributions from the FBI into the EPIC Program in Texas. And they also are looking at, I believe, rotating the command of the new Drug Intelligence Center that I think came out of legislation 2 years ago, I believe.

The CHAIRMAN. We drafted that legislation and passed it, and, quite frankly, we are a little bit disappointed in the lack of enthusiasm for making it work the way it was intended legislatively.

My time is up, but let me conclude this round by asking you the following question: Do you pledge, Tom, to this committee that you will in your capacity as Administrator pledge your cooperation to this effort to consolidate the intelligence capabilities?

Mr. CONSTANTINE. Absolutely. Without equivocation.

The CHAIRMAN. I have one more question while we wait.

Senator GRASSLEY. I hope you will do that for me some time.

The CHAIRMAN. Well, when you are the ranking member and I need your cooperation to even have a hearing, I will be happy to do it.

Senator GRASSLEY. I think maybe because of the ranking member you do need my cooperation.

The CHAIRMAN. That is a good point.

As you can see, this is a little bit of a change because the Senator is just getting off the telephone and it is his turn to ask questions.

One of the things that we worked very hard on, the Senator from Iowa in particular, because the Senator from Iowa, the Senator from Utah, and the Senator from Delaware are from rural States, is the place, the little example you gave of the town that gives a new definition to rural. What you have seen in New York State is happening in spades all over the West, to a degree much worse than in New York State, I would respectfully suggest, as bad as it is.

What has happened is, as I need not tell you, as the inner cities in effect have been saturated, the markets have been split, and the

markets have been competed over and shot over, what has happened is they have moved the markets out to rural areas. Rural crime, as you know, running the troopers' outfit, is rising at a faster rate in America than urban crime. And too many people in this place do not pay enough attention to the fact that folks from States like ours are literally as much in trouble as States with very large cities, metropolitan areas.

On the west coast, the Bloods and the Crips have moved their meth laboratories into Montana, Idaho, northern Utah, in ways that have literally taken over whole communities. And we have in the crime bill a quarter billion dollars to deal with that, but part of it requires the coordination of the Drug Enforcement Administration in the drug bill we are going to pass with local officials. And I assume you believe that is a worthwhile and necessary undertaking for the DEA.

Mr. CONSTANTINE. Yes. I think what you find is that our experience, and we work from obviously the most urban where we have almost 300 people in New York City, to some satellite stations where we only have 1 person working for a whole area of probably 8 counties of the Adirondack Mountains—is that you need to have a coordinated aspect to the investigation because the drugs that are offloaded into New York City and then are shipped to rural areas of the State are really the same drugs. The 2 pounds of cocaine that leaves Manhattan and winds up in Plattsburgh, NY, or in Massena, NY, and later becomes crack cocaine, is the same drug. And there is a vertical hierarchical conspiracy that puts all these things together.

So what we do is we recognize that you have to help the community of Massena. You have to help some of the other even smaller places than that. But the information that you derive from that, even if the arrest is made by the local police, if they can have somebody there from DEA, if they can have somebody there from the State police, they can say, look, you made this arrest, you have seized the 500 vials of crack, you have done a good job in that village or in that town. However, that whole series of computer records, that notebook, that telephone book that you have grasped under that seizure of the search warrant is extremely important in providing information to a case against major figures who are responsible for your problem.

For that reason, you cannot have a disjointed investigation, and I believe that DEA can play a major role in that type of coordination.

The CHAIRMAN. I will go back to that. Now I yield to Senator Grassley, and he has 15 minutes, not 10 minutes.

OPENING STATEMENT OF SENATOR GRASSLEY

Senator GRASSLEY. Well, I do not think I will need 15 minutes.

I have already congratulated you on your appointment. There is probably no position in Government—considering the problems that drugs rain on all of society, including family breakups, the impact on the economy, the impact on our prison population, and other social costs—where you have such an opportunity to do so much good and make such an impact. I think there is probably no

other position in Government that has that opportunity, considering how bad the problem is.

I wish you well. The Chairman has discussed the President's proposed DEA budget. I do not know whether he mentioned this, but full-time personnel positions will be cut by 355. It is true that since the new administration took over, we have not hired a single new DEA agent, and it looks like none will be hired before 1996, at the earliest. Even without the 1995 cuts, I think there are close to 200 fewer DEA agents today than there were in 1992.

You have come from a position where you ran one of the largest police forces in America, and I think you know the number of personnel required to fight drug trafficking. I suppose I am looking to you for some assurance that the proposed personnel reductions in your agency will not harm the agency's goals of seizing drugs, preventing drug smuggling, and arresting drug traffickers. I'm also interested in your reaction to the budget and your ability to meet those goals, particularly as you know the need for a large number of people from your current work.

Mr. CONSTANTINE. Well, you mentioned the large agency, and in State government, starting in 1988—and I think every State in the country had similar problems—we went through devastating years of fiscal impact on government. We were no different than the New York State Police. We had to make decisions with the amount of money that was available to us. The budget was not going to change. It could not be increased.

To do that, we caught a lot of programs that we did not think were front-line programs, the things that we would like to have had. There were certain pieces of technology, there were certain information systems I think we really some day should get and would have liked to have purchased at that point in time.

What we did was we put our focus on the front-line, which was keeping the trooper, which was the front-line strength, which I suspect is similar to the agent, as close as we could to full authorized strength, and the same with their supervisors. We reduced the number of civilian positions. I had the unfortunate task of laying off civilians, while simultaneously hiring sworn troopers, which the civilian employees could not understand, and I suspect do not understand to this day. That was the approach that we utilized with the money that was available to us.

I am not yet an expert on any budget. That is a whole discipline in and of itself, and I am sure that the Federal budget is really something to get involved in. I have not had someone review in exact detail how that DEA budget is put together. I do not know what types of positions were FT's, is the title they apparently use frequently in the Federal Government, before this started, how many of them were involved in the front lines, how many are in staff positions, where they are with civilian positions.

I can say, although I have not been involved in this particular budget-making process, obviously, I have always been a strong advocate for people in law enforcement, not for the bureaucracy and not for governmental gain. It is my experience there is probably only one group from Government that deals with victims of crime, and that is police officers. Prosecutors see them much later, usually when they are cleaned up and the trauma is over with. The judges

see it much later. The correctional officials see it much later in the game.

So I have spent a lifetime meeting with victims of crime, talking with survivors, and I have always felt that it was my job to represent them, and I represent them by trying to solve more crimes, arrest more criminals, and that takes certain amounts of assets. So I will be a strong advocate. I have not obviously been involved in the present process, and I really do not know what the implications of—

It is my understanding that the last three fiscal years have been the problem. It is not this immediate one.

Senator GRASSLEY. If I am right, that out of these 355 positions, 200 would be DEA agents, then your trend, based upon your past experience, would be to try to retain as many DEA agents as possible, and reduce civilian positions in your bureaucracy, rather than in law enforcement.

Mr. CONSTANTINE. That has been my management approach in difficult fiscal years in the agency that I run presently. There comes a point in time where really all the good ideas of cutting the budget are gone, all the moderate ideas, and you are only dealing with bad ideas.

I think in the initial stages, you look around to see where in the bureaucracy you can save money, to put that money into the front line where people are actually making cases and arresting defendants.

Senator GRASSLEY. But you have not concluded, under the President's budget, that you can do that now? Are you saying that you do not know enough about it?

Mr. CONSTANTINE. That is correct.

Senator GRASSLEY. But that is what you tend to do, as an administrator in law enforcement.

Mr. CONSTANTINE. That is correct.

Senator GRASSLEY. So to the extent to which you feel you could do it, you would tend to reduce less of the agents on the front line, and more of the people behind the agents.

Mr. CONSTANTINE. I would say at least my style of management, that is the last places that you cut, is the agents on the front line.

Senator GRASSLEY. The Bush administration banned doctors from prescribing marijuana for patients, because it found that it had no medicinal value. And the most recent Director of DEA likened the advocates for drugs medicinal purposes to something on the order of snake oil salesmen. Of course, the U.S. Court of Appeals recently backed up this finding.

Now, we have published reports suggesting that the current administration is reconsidering the ban. What is your view on whether new patients should be allowed medicinal use of marijuana?

Mr. CONSTANTINE. I have never experienced this until I got involved in being nominated for this position, or even paying any attention to it, because it is an area I guess of rulemaking or decisionmaking that DEA is involved in. Originally I thought it was going to be some type of a complex issue. It gets emotional, usually. The person that is portrayed on television is somebody with some type of a terminal illness who says that the marijuana is the only

thing that prevents the nausea probably from some very invasive chemotherapy or radiation.

But the best answer to it I saw was in a letter to the New York Times written by the fellow who is the Acting Administrator of the DEA today, Steve Green, who laid out all the arguments. But the nuts and bolts of it were that it was their opinion of the medical community that the substance within marijuana that reduces the nausea and causes at least the moderation of some of the symptoms is the THC content, and that is easily put in tablet or caplet form and provided to the person who has that illness. So I would see that as a much better alternative under medical prescription to somebody, an extremist or some type of difficult medical situation, than giving out marijuana cigarettes.

I would suspect that if you are ill, the effect on your lungs of all of the carcinogens from the marijuana does not seem to me to be a healthy thing to be doing for people who are sick already. And if you can provide that same substance in a tablet, I think that obviates the whole argument.

Senator GRASSLEY. Well, is the present administration considering changing that policy?

Mr. CONSTANTINE. Not to my knowledge, but I am not aware of the stand on the policy.

Senator GRASSLEY. By the way, I observed your answer to the chairman's question about how important you feel is the use of Federal funds to help fight drug trafficking in rural areas. I am glad the chairman asked that, as it is also a concern of mine.

On another point, in the course of carrying out its efforts to fight drug trafficking, I believe DEA has tried two different approaches. In one, DEA field officers spread throughout drug trafficking areas, operating on their own to fight traffickers with monitoring from headquarters. In other efforts, DEA headquarters not only monitored, but also took the lead in planning and carrying out the actual work of fighting drug traffickers. Do you have a particular approach that you might emphasize in your administration?

Mr. CONSTANTINE. Well, I am not knowledgeable about exactly all of the mechanics that you have talked about. I think it is best in any large law enforcement agency or in the military or any other type of structure such as that, that you recognize that the people in the front-line operations and what we call the field operations, the headquarters is basically there to serve them, to provide intelligence to them, to provide assets to them, research and planning.

Because they are so close to the problem and they are so aware of the ramifications, if you push the decisionmaking up to some distance place, it takes so long for the information to get there, that you are unable to respond.

Now, because of the fact that DEA operates obviously in the international community and nationally, it is essential that they be able to bring together information that may not seem very important to the individual in charge of the New York office of DEA, but in the overall scheme of the investigation that focuses in Houston, TX, is extremely important. So there is a need for a coordination of that information and to some degree the management.

The one thing that we learned I think in America is that micromanagement from a centralized, standardized location has

not been effective, and that is why all of industry today tries to move the decisionmaking down to the local level. Sometimes you can replicate that process by ensuring that you are getting input from those people in field command positions, because sometimes I have had great ideas in Albany, NY, that I thought were world beaters, and when I sent it out to the field, I looked pretty stupid, because it was unworkable and I really had not consulted with people who knew a lot more about it.

Senator GRASSLEY. If that has been your philosophy in law enforcement so far—I do not argue with your answer, and I think you gave the right answer—would you agree it may be even more important, considering the international aspect of drug trafficking?

Mr. CONSTANTINE. I think DEA is different from the State police. I think they are an agency that can have some time to plan out where they want to go to. We are more of a responsive agency sometimes to an immediate crisis. That affords you the opportunity, and if not the opportunity, really kind of a mandate to ensure that there is a coordination nationwide of some of the investigations.

The trick is to find the balance between providing coordination and direction from headquarters and that smothering and stifling local commanders who wind up not having any decisionmaking capacity, and they really are the most knowledgeable about some of their immediate problems in the community. That is a give and take. I have never seen it done perfectly. I think you can try to improve it constantly by seeking the information from everybody.

Eventually, when you get all the information in and you feel this is a strategy that is important, then after everybody has had their say, then everybody has to get in line and say, okay, we have made our contributions, we have been allowed to focus our opinions, this is the decision of where we are going to go and we are going to go forward with it.

You know, I hasten to add that, in my opinion, I see DEA from many relationships over the last almost 30 years since the time they were the Federal Bureau of Narcotics, and I do not think you can underestimate the fact that they are an outstanding police organization who have made tremendous investigations and are very positive. It is not their fault that the problem has not been immediately solved. I think sometimes people would look to them for that.

I think they have done well. I think there is a chance to do more in the future. I think there is as chance, with the evolution of technology and the conversion of defense technology, to maybe even do more in the way of sophisticated investigations.

Senator GRASSLEY. This is my last question, and it revolves around a point of whether seizing drugs or arresting kingpins is a priority of yours. I just want to give you last year's statistics: 123,000 pounds of cocaine, and 1,221 pounds of heroin seized, 21,000 suspects arrested. But the fact is 10 Colombian kingpins are involved with and responsible for 80 percent of the world's cocaine. So what is your approach in regard to DEA's unique contribution to fighting drugs? Should it be a priority to stop the drug lords, considering the impact they have on the world drug trade, or should it be some place else?

Mr. CONSTANTINE. Senator, I think it has got to be a balanced program. I have been involved in major international investigations in the State police. We decided to investigate, because we did not know it was the Cali cartel. All we knew is we had a problem. It became the Cali cartel, and we then looked and we found that there is a vertical structure that is used that usually starts in a foreign country, whether it is South America or the Far East, and that there are employees of that structure and there are records and there are businesses and there are rental car procedures.

We looked at some of the records we used to seize and it looked like our station operation records. They were responsible for the toll calls, and they were being criticized for spending too much money on fax machines and cellular calls. I could have transposed the inspection of the Saratoga State Police Station to the records that we were seizing from the Cali cartel.

Back in the 1950's and 1960's—and I had the fortune to work under Ed Crosswell, who uncovered organized crime in 1957, when nobody thought it even existed—and people said there were documentaries, there were shows, they said we would never be able to have an impact or an effect on traditional organized crime in this country.

I think, in great credit to the Federal Government, DEA, FBI, and the various U.S. attorneys, they have had an impact and they have got them on the run in certain places. That is not a lot different from what you are seeing in these cartels, whether they are heroin or cocaine. It is that rigid an organization, it is that rigid an enforcement, but the narcotics creates a vulnerability for them.

Now, I think what people have to look at—and this is an area that is unfamiliar to me at present—I think you can do a lot with indicting and convicting substantial people in that organization, as they operate within the territorial confines of the United States. There are numbers of individuals that we have indicted in our State investigations who are living without the United States in countries that I understand we do not have extradition treaties with or extradition is not a reasonable solution.

I suspect those countries, if we can provide the information to them, if they can use that to bring them to justice, you will have an effect. I mean if people think that this is unwinnable, just look at the outrageous conduct of the Medellin cartel people, as they saw the pressure increasing on them and they thought by killing judges and killing police officers and killing prosecutors and blowing up buildings, that they could avoid any impact on their operation.

That has been to a large degree in that one area successfully fought. I mean they are not sitting there thinking that we cannot do something about it. I think we can do something about it. I do not promise to save the world. That would be absurd. It took us 30 years to get into this problem, and it will probably take us 20 or 30 years of a lot of work, a lot of assets, and the will of the American people to change it.

Senator GRASSLEY. Thank you.

Senator HATCH [presiding]. Thank you, Senator Grassley.

Welcome to the committee and welcome to your family. It is a wonderful family. Your reputation is very high in my eyes, and I

look forward to working with you and supporting you, not only in committee, but on the floor. So you have a strong supporter in me, as I think all former DEA administrators have had.

I understand you have already been asked about rural crime. That is of great interest to me. A lot of our rural States are ignored in some of these matters. Utah is a large transshipment State, because of the highway system and being the crossroads of the West, and I would want you to really give some consideration to rural crime in this country.

I also know that Senator Grassley has asked you about the budget cuts, which concern us all. Let me just talk in terms about drug interdiction. Supply-side reductions in general and drug interdiction efforts in particular have been the focus of the Clinton administration budget acts, and it is a matter of great concern to me.

Again, I acknowledge that being President of the United States is a tough thing. You have got budgets, you have got everybody calling for constraint, and you are looking everywhere you can. The proposed 1995 budget cuts DOD interdiction efforts by \$150 million. And you and I both know interdiction efforts prevent substantial quantities of drugs from reaching our streets, and from an investigative standpoint, interdiction leads to arrests and seizure of evidence crucial to eliminating high-level traffickers and their sources and agents.

The purpose of interdiction is not to stop drug trafficking completely, which you and I both know seems to be an impossible task. The purpose is to stop a significant portion of drug trafficking and to make trafficking more costly and difficult. In the desire to advance treatment and prevention efforts, which of course I support, I am concerned that our interdiction efforts are being compromised and hurt.

Now, I would just like to know what your opinion is of the relative importance of interdiction, and does an increased commitment to demand reduction necessarily require that we cut supply reduction efforts?

MR. CONSTANTINE. My answer may be somewhat unfair, because I think all aspects of it—and I see it like a three-legged stool. You have got prevention, you have got enforcement, and you have got treatment. And if you fool around with any of those legs of that stool, it never works, and that is what I said, it is a problem that we got into over 30 years, it is going to take us tremendous will to get out.

I have not got a lot of background in general Department of Defense interdiction. There have been some attempts on the northern border of New York State, I think the project was called North Star, that we participated in, and we assigned our mobile response team and helicopters, and we were able to determine—it was a very expensive, I thought, operation, that there was limited or no payback, at least on the northern borders that stretch with Canada.

What has been effective is specific interdiction where you have got good intelligence, and I think as the defense conversion technology becomes available to perhaps law enforcement with some degree of I suspect confidentiality of information, that you have maybe a bigger payback with the interdiction.

I think what you are talking about, if I am right, is the threat of interdiction, especially around the southwest or southern border, the mere threat without a lot of arrests, kind of a general deterrence theory, would be effective and, if reduced, would be degraded.

Senator HATCH. It is more than that. It is—

Mr. CONSTANTINE. I am just not familiar enough with it to give you a good answer judgmentally as to whether I think it is a good idea or a bad idea.

Senator HATCH. It is more than that. It is using the Coast Guard and radar and a number of other facilities to be able to just really catch these people as they try to skirt the issues.

You will find, as you get into it, that down in Mexico they have phase one of their radar system in place and doing quite well, but now they are coming in through the Acapulco region and Cancun region and getting around it, so they need the phase two or really three and four, and I have been encouraging the President of Mexico and others to finish that. The problem is it costs about \$80 million, and they are having their difficulties. But they have committed to us that they will try and do that.

As you get into some of the foreign affairs aspects of the Drug Enforcement Administration, I think you will see various ways that we might be able to interdict or stop some of the flow of drugs, and I will be interested in working with you on that and maybe even traveling with you to some of these areas where I have been and show you some of these things.

To make a long story short, I hope that you will keep all three legs of that stool going and advocate very strongly with the administration that they have got to, because there are some people in the administration that are not doing what is right budgetarily with regard to this very, very serious set of problems. Some people are concerned that there is a different attitude down there about drugs, and I am concerned about it.

Now, they are going to not be able to ignore you, is my point. And if you hit the ground running and make it clear that you are not going to tolerate taking one leg of the stool out, so the whole thing falls down, I think you can help a great deal here. We have also put these other obligations, rural crime and so forth on you that add to your burden, too.

I mention the national household survey of drug use and how the casual use of marijuana, LSD, and inhalants is increasing among our young people, something that really concerns us, because once they get hooked on those things, then it is easier to go on to the harder drugs. I am worried about our young people getting the wrong message, so I am hopeful that, as head of DEA, you will get out there and really do the best you can as far as pushing the whole antidrug attitude in this country.

You can see those trends up there in prevalence for any illicit drug use for high school seniors from 1981 to 1993. You will notice that, as of 1992, they are sharply increasing, in 1993 they are starting to sharply go up again. And it is a matter of great concern to us and it is something that is going to be one of your biggest headaches, unless you just grab that ball and run with it.

But some have criticized my emphasis on drug law enforcement and the fight against the drug scourge. They consider it a prohibi-

tionist strategy which was destined to fail. Now, as a law enforcement executive, you have had the opportunity to witness firsthand the impact of law enforcement on the various communities, and certainly in New York, on fighting drug abuse.

We all believe in treatment and prevention. You know, how can you argue with that as part of the antidrug strategy? There are limited funds. I would prefer to see the treatment and prevention funds going for those who are casual users and those who we have a chance to rehabilitate, rather than the hardcore addicts, although I do not want to ignore them. We have to do some things there, too. But do you believe that law enforcement should play a predominant role in curtailing drug use in this position, as well?

Mr. CONSTANTINE. The things that are talked about which I endorse wholeheartedly, prevention and rehabilitation, something that shrinks the pool of people that we have to deal with, our programs that, if effective—and I hope they are going to be effective—are 5 to 10 years out. The problem that you have, and the best analogy I have ever heard of this was from a fellow who headed the State school boards, and he and I gave a number of speeches around the State on violence in our schools, and there was a discussion of this root cause versus police law enforcement action back and forth.

This professor said, you know, sometimes when your child has a fever, you have to spend a great deal of time finding out why that fever occurred and trying to prevent that fever in the future. But he said sometimes the fever itself is life threatening, and that fever has to be treated before you can solve any of the rest of the problems. And I think that is where law enforcement is.

I hope people do not underestimate the impact of that chart that you have put up there, because there are two factors in there that are not included in the chart, but I recognize them, as a police officer, very quickly. Not only do you have now a fairly substantial indication of a change of attitude, what you are going to see—and I have to keep taking my glasses on and off to see the chart or talk to you—what you are going to see in years 1995, 1996, and 1997, you are going to see a substantial growth rate of people in those years of vulnerability.

Also, what we know is that, since 1987, almost all of the real surges and the increase of violent crime are occurring in 15-, 16-, and 17-year-old kids. If we took them out of the mix, you would only have a 1-percent increase in the violent crime rate since 1987. So the fact that we are showing, one, a change in the increase of drugs, and, two, demographics that are going to give us a bigger population of people in those age brackets that are going to be susceptible and this whole violence thing, I am—as I said before, I hope I am not an alarmist, I try not to be an alarmist, I am proud to be an optimist—I am concerned that the lack of addressing this over the next 5 to 10 years—I don't think you can address anything in a year or 2 years—the next 5 to 10 years, as a society, without addressing the drugs, the violence, the cultural problems, I do not know where we go to.

I deal with people who are afraid to go down to a PTA meeting at night to see how their kids are doing, because they do not want to get shot, because all the dope peddlers control the corners. I

mean people now buy their house, send their kids to school, decide where they are going to play, decide where they are going to shop, with fear of crime as a major factor in creating that decision.

What we have is the chart that you put up, and I think if somebody overlayed the other charts on there, you would see the problems that we would face in the future.

Senator HATCH. Thank you. I believe it is a small minority within the administration, but some have chatted with the press about legalization, and my understanding is that you are——

The CHAIRMAN [presiding]. I believe it is only one who chatted, and she is not going to chat ever again, I suspect.

Senator HATCH. I hope that is true. There are some others, however, who have some tendency to think that legalization might be the answer here. My understanding is that you are fairly strongly against that.

Mr. CONSTANTINE. I think more than fairly strongly, Senator. I have kind of written on it, and I told you I grew up as a kid and saw drugs, I was scared stiff of them. I could not understand in the 1960's, having had not a lot of money or education, how people with wealth and tremendous opportunities would ever allow themselves to be absorbed by this problem. And I think we were led astray by a lot of people who told us that cocaine was not an addictive substance, it could be used recreationally to enhance our life and there were not problems to be concerned about in the future.

I do not know where those people are today. I have got to tell you something: If you drive through Washington Heights in Manhattan, and I will show you what the impact is of that.

Senator HATCH. You will not have to show me. I have seen it, too.

Let me just cover one other issue which is very important. There are so many in this area. I will be honest with you, I think you are a terrific appointment and you are one that gives me a lot of heart here, because I have been very—I have to say Judge Bonner did a great job under very difficult circumstances, too, and I was really pleased with what he did, and others.

But I am really heartened by your appointment and I commend the President for choosing you and I look forward to working with you. But let me just say one other thing: As a law enforcement official, you are undoubtedly aware of how important court-ordered wiretaps are to criminal investigations. However, law enforcement may find that it will be unable to effectuate wiretaps in the not too distant future, because of the technology that is coming along. The telecommunications industry is rapidly moving to more advanced digital telecommunications systems which may make it really practically impossible to effect lawful wiretaps.

In the past years, the FBI had been working with law enforcement and business in an effort to clarify the responsibilities of telecommunications companies in this area. I believe Senator Biden and I plan to introduce legislation on this subject, or at least I hope we will, which will assure the effectiveness of court-ordered wiretaps.

Now, do you believe the continued use of court-authorized wiretaps by DEA is critical or not critical to our drug control efforts?

Mr. CONSTANTINE. I think you would be out of business on dealing with the major cartels, in other words, without court-ordered wiretaps, it is possible you would not have been able to prevent the attempted bombings of the United Nations a year ago in the FBI investigation, we would have never convicted John Gotti, we would have never done the huge pizza connection heroin cases. Many of the cases that DEA has done on the substantial people who are running these cartels are absolutely impossible to do, unless you have got a way with a court order to intercept communications.

Eventually these people have to deal with each other. If you are in a major business, you have got to communicate and you cannot always meet on a corner and talk as you are walking along, to avoid somebody overhearing it. Just the nature and the pressure and the size of these businesses, these are billion-dollar businesses, they have to communicate with one another.

So it is essential. I and everybody in law enforcement is concerned. Obviously, technology is moving in a direction where, in essence, even with all of the things that you have in government, you being unable to meld your limited resources with the way technology is changing.

Sometimes the industry has resisted this. I would hope that they would not. I would hope that they would kind of look at some of these programs. I know Director Freeh and Vice President Gore have been very active in trying to address this issue immediately, because many of the same industries that are concerned about this are those that operate in areas where their employees, their businesses, their tax base are all affected by crime. So it seems paradoxical to me that you would have this crime problem and you would want to do something about the crime problem, and that government is in urgent need.

So I think it is a question of trying to blend together technology—which I do not even understand, but I understand the issue—that is moving rapidly and to protect American businesses, but also the capacity to enforce the law. You do not get a court order frivolously. There is an awful lot of work that goes into it. There are an awful lot of protections built into it. But I can tell you, absent that, 50 or 10 years down the road we would be out of business.

Senator HATCH. I think it is important for America to know that the noncriminal American is not going to suffer as a result of the necessity for law enforcement to be able to overhear some of these criminal conversations.

Let me just say this: I apologize for not having been here right at the beginning of this meeting, but Mark Klaas, Polly Klass' father, had come to visit me and is very concerned about where we are going in some of these areas of criminal law, and so I apologize for being a little bit late.

But we are really happy to have you here. I personally am very solidly behind you and will do everything I can to support you, not only through this process, but after you become the Administrator, and do everything I can to see that you are well-funded and that you have the assets and the tools to be able to do the job for this country, because it is a very, very important job, and I know you can do it and do it right.

I thank your family, especially your wife, for being willing to make the sacrifices that I know she has made in your current position, which may even be greater in some respects in this position. I thank you for being willing to serve, and I hope you forgive me, but I have got to go to another meeting.

The CHAIRMAN. I have a few more questions for you, superintendent.

Before the Senator from Utah leaves, let me indicate to him that I share his concern about the cuts that have been proposed. He and I have worked through administrations. One of the strange things that happens here in this committee is that we have in unison worked toward forcing upon reluctant law enforcement agencies more money over the past years in more administration more effort than they have wanted. So one of the things you will find here, your most difficult problem will be trying to come and explain to us why you do not need what we want to give you.

With regard to the cuts that have taken place in the charts, the fact of the matter is that I think what we are seeing in that trend and prevalence of any illicit drug use of high school seniors is alarming, in the sense that there is an up-tick, but it is not alarming in the sense that, first of all, that high school survey leaves a lot to be desired in terms of—I am not sure the degree to which it is efficacious to use that to measure what the usage is. It is not good, but the survey itself has some problems.

One of the things I want to point out, which leads me to the question I want to talk to you about that you know a lot about, and that is for the last 5 years I have had the dubious distinction of being the person who, when the former President of the United States, under the law, was required to set out a national drug strategy, I would simultaneously put out what was then referred to as an alternative drug strategy, a detailed strategy. I do not know if we have copies of those strategies with us. Every year, I would put out a strategy that was meant not to be critical of, but complimentary to, and where I disagreed on behalf of the majority in the Congress with then President Bush's drug strategy, to lay out what I thought an alternative should be.

Director Bennett and I—and I think he was a good and appropriate person to be, notwithstanding some of my colleagues on this side of aisle who did not think so—to be the drug director, the drug czar, because he had the energy and the commitment and intellect that really forced everyone to focus on the drug problem. He and I had an ongoing argument as to what the essence and our focus should be, with our limited sources. Although we spent a lot of money, about \$10 billion a year on this effort, I consistently argued that we should focus on hardcore users, and he insisted that we focus on the casual user.

Now, I do not suggest that it was so obvious that he was wrong and I was right. We had a different emphasis. When I could not convince the administration of what our focus should be, I supported their efforts. But the truth is that casual drug use, which essentially is what we are talking about there, although there are some hardcore users that fall within that graph. That dropped off precipitously before there was ever a drug strategy.

Now had it been a Democratic President, the Democratic President would have claimed credit for the drop, just like Republicans claimed it. It always amazed me, you know, Governors claimed credit for the economy of their State when they are going well, and point out that it is the national economy when it goes bad. The truth is, Governors do not have a whole lot to do with the economy of their States, any more than the President of the United States has as much to do with the economy of the Nation any more, because more money is transferred at night by electronic transfers than the Federal Government can control.

You know, Governors do not mean much in the economy and Presidents do not mean as much on the domestic economy as they think they do. The truth is we do not mean as much in terms of drug use. The moral disapprobation of society played the part on this casual use, as it dropped precipitously unrelated to anything we did.

Now, I would just point out for the record that up-tick, which I assume part of my friend from Utah's point was it happened on the Democratic watch, that up-tick occurred from a policy program that was put in effect in a budget that was controlled by the last administration. I do not think that means anything, for the truth of the matter, one way or another. But I just want our friends in the press to understand that the up-tick did not occur on the President's watch. It occurred on a strategy that was one that was put in place before he became President.

But that is not the relevant point. The relevant point that I want to discuss with you is, in this strategy this year that I put out, the DEA in the strategy that they were part of agreeing with the drug czar, DEA-FBI, but Lee Brown's strategy put out on behalf of the President of the United States, there is a marked shift in emphasis here, a shift from focusing basically on casual use to not discarding that, but focusing on hardcore users.

Now, one of the things we found out, we have known for some time, is the hardcore users consume in total quantity the bulk of, the majority of the drugs consumed. They make up a very much smaller number than the total universe of all those who use drugs at all or have used drugs at all in a single year. They are roughly 2 million people, and we can argue about whether it is 2.9 or 4.6, but in the total scope of things, they are a small percentage, but they consume the majority of the drugs produced and/or delivered and disseminated in the United States.

Now, do you agree with the administration's shift in emphasis to hardcore users as a focus of their strategy.

Mr. CONSTANTINE. When I give this explanation, Senator, I am not a sociologist or an expert in those treatment decisions. But I think what you see in that 1985 to 1992 casual use was shortly after that—as I may have mentioned previously—was this idea or sense that cocaine was a substance that could be used recreationally, was used in all types of social settings, was part of every movie theme and television theme and really became a romantic drug to be purveyed to the public.

I think what you see in 1985 is the beginning of crack cocaine and the horror stories now started to come out that this was not some nice substance that made life a little bit more comfortable,

but really a destroyer. I also think what you saw when you had crack cocaine was the price dropped dramatically, in addition to the addictive capacity.

When that happened, it created a whole new market which was poor people. Previously, powdered cocaine was, in all honesty, a drug for the wealthy or middle-class or upper-middle-class. Crack cocaine, with its \$10 vile, now became a marketable commodity to poor people, with the most susceptibility to those types of social problems, and the fewest options of getting out of them. And the casual drug user I suspect was somebody who is middle-class or upper-class, the family now creates a lot of pressure for the individual, maybe even has the resources for a 30-day treatment program at a very progressive or at least expensive type of a facility, and poor people did not have that. And I think that is where you have most of the hardcore users right now, are those with the fewest options.

So if you can be successful in the treatment of hardcore users, and that is going to take a long time, it is going to take a lot of staying power, and you cannot give up tomorrow on any of these programs. You have got to say this is a 5- or 10-year program, and that is when we will say whether we win or lose. I do not think it makes any difference who is the President, it should never be a political issue to attack back and forth.

But I think if that were to happen and you can be effective in the area of hardcore users, you are going to reduce some of the demand. More importantly for me, you are probably going to reduce a great deal of the violent crime as you get into those aspects of it. For all of those reasons, I do endorse that program, and I am not an expert on what treatment works or who should be in it.

The CHAIRMAN. It is not merely treatment that we go after, although we do make a shift in the President's drug strategy and the proposed drug strategy that I have spoken to. The approaches are consistent. There are 5.7 million hardcore drug users. Of those, 2-plus million are cocaine abusers.

It is interesting: I held a hearing here about 3 years ago where we had the AMA, who still would not list cocaine as an addictive substance, the medical community concluded. I remember being here in 1979 or 1978, when there was a Dr. Boren, a good man, head of drug policy for the Carter administration, who said why are we picking on cocaine—and I am paraphrasing.

I would like to ask you, in your experience as a law enforcement officer, who are you more wary of dealing with, the addict on junk, that is on heroin, or the addict on cocaine?

Mr. CONSTANTINE. Well, when I was working on the street in narcotics activity for about 4 or 5 years, heroin was the prevalent drug, and cocaine was a luxury-inhaled drug that nobody had enough money to get, because they had spent all their money on heroin. Most of the people who were addicted to heroin, really, we used to call it going on the nod. You could kind of tell, if you were in a heroin junky's apartment, by the number of cigarette burns in the furniture, where they would doze off and the burns would go in the chairs and tables, not usually a violent situation.

The crimes that were committed were threatening. In fact, they burglarized my mother's house once, and that was very threatening

to her. She was living alone. My dad had died. But they would break in the house and steal furniture or they would be involved in a lot of shoplifting, a lot of prostitution.

Very seldom violent when under the control of the substance. I think in cocaine, as a whole this has switched, especially crack cocaine, every time I read the teletype messages every morning of the arrests or injuries to our troopers, there is a great deal of fights that involve people who are either involved with methamphetamines or cocaine, because they both are stimulant drugs. In the case of cocaine, it provides this cocaine psychosis, and then we wind up with these deaths by asphyxiation that result as a combination of cocaine and the restraint systems. It is much more dangerous as a substance to the behavior of people. That is my experience.

The CHAIRMAN. You know, it is interesting. Senator Moynihan talked about our past experience, and there is a professor out of Yale who has done a lot of work on this and written a book called "First Epidemic," by Professor Musto.

When I debate in absentia, at least, people like William Buckley and others on the legalization argument, pointing out that it would not work, I usually start that speech by quoting from the Baltimore Sun, where a police chief is saying the decade of the 1980's have seen this all rise and violence, et cetera, et cetera, and the audience kind of nods, they understand that, it makes sense. And I point out that it was the decade of the 1880's, and that the violence attendant to drug abuse escalated dramatically with the introduction of cocaine then and now.

I would like to speak about crack cocaine for a minute. Crack cocaine, unfortunately, has been a great leveler, a great equalizer. As you point out, its cost and its immediate stimulant effect and the resultant depression that comes from the downer immediately after the effect all have now been made available to poor folk, and it has been a great equalizer, as well.

When you started in the business of dealing with trying to deal with narcotics trade, I believe the numbers were roughly, for every one woman who was addicted, there were four men. Now it is about one to one. And to use facetiously that phrase "you have come a long way, baby," women have come a long way in becoming part of the addicted population, and the reason is crack cocaine, because of the cost and availability.

Also, crack cocaine, as you know better than I do, is responsible for the spread of AIDS almost as much as heroin, swapping of needles is. People say why? Well, you know why. It is prostitution, the way in which these women are able to binge on \$5, \$10, \$15, \$20 hits of crack cocaine a day. I can take you to places, as you could me, in Philadelphia that I have witnessed, look up in a window and see a woman—and I will not be as graphic as I observed—but you could see in an apartment window where you would see man after man walking in about every 10-minute or 15-minute intervals, where, to use the phrase, women would turn 10, 12, 15 tricks a day in order to get that vile of cocaine, which was the payment from the junkie or from the distributor.

So one of the things that has come up, and I think is a legitimate thing, the experts told us, when crack cocaine came on the market

in a big way starting in New York, and before that starting in the Bahamas in the mid-1980's, that it was more addictive, in that it immediately penetrated the membrane of the brain and so on.

So we came up with some very tough penalties for crack cocaine. The result has been, though, that white middle-class folks who still do "a line of cocaine" arrested will get much less time in jail than for the black woman or man, because they are in the poverty stream, their access is crack cocaine, and there is a discrepancy now in terms of the sentencing.

This is not your area. I am not asking you, as the future Administrator of DEA, to determine whether or not we should change the sentencing laws to essentially make equal the application of punishment for using powdered cocaine and crack cocaine. But it is very offensive to the black community, and I think with good reason, where it appears as though someone who spends less money on a drug that is potentially arguable more addictive, because of the nature in which is taken and ingested into the body, and someone who snorts cocaine, spending more money, that that person who uses the \$10 vile caught gets minimum mandatory sentences under the Federal law and/or many State laws, where someone who does as line of cocaine, to use the parlance, that may cost more money does less time in jail.

Do you have any sense of the equity or inequity of that, in your capacity as Superintendent of State Police, having seen this?

Mr. CONSTANTINE. I think the same thing happened in New York State, and our sentencing structure is that people—and it first came from California. I remember Ben Ward, the former commissioner of New York City, I always thought was ahead of the curve on a lot of stuff, he spotted it quickly when it was rock cocaine out in California, and then it became crack in New York City. I think our legislature and everybody else became so alarmed at what they saw, as this vista of tremendous destruction through crack cocaine, responded with a great deal in the way of sentences.

I would think that some of the things that you have talked about already, which is treating or somehow providing some type of a program for hardcore addicts, a lot of those are going to be crack cocaine addicts. One of the things that we suggested last year in our violent crime report from the International Association of Chiefs of Police was, as we close military bases, that we might make them, along with some of the military personnel, available for not prisons for violent criminals, but for non-violent addicted people, that the base could be used for a combination restraint and rehab program, so that we would direct them against that, rather than lengthy sentences.

Now, I cannot tell you how long it takes to work a rehab program, but I think that would be a more worthwhile investment than a lengthy sentence, because most crack cocaine users are so severely addicted, you are better off to go I think some type of a rehabilitative mode than a long incarceration. That does not include major sales, though. I think you have to keep the sentencing structure for that.

The CHAIRMAN. What the community is talking about is not the major sales. They are talking about the woman or man who gets caught with a vile of crack cocaine and gets a minimum mandatory

5 years in jail, and the doctor, the lawyer or the Indian chief, to use the facetious references to people in power, who may get caught at an uptown party doing a line of cocaine on a mirror, that person does not get put in jail on minimum mandatory.

That program that you and the chiefs endorsed, you may remember, was a program that I proposed for regional prisons for that purpose, although my Republican friends are very, very supportive of very strong efforts. One of the good things that has happened in the crime bill this year is conservatives and liberals made a big move. We finally stopped this debate about whether or not you need tougher enforcement or deal with treatment and education. You have guys like Senator Gramm of Texas, known as a conservative on this issue, voting for more treatment and education, as well as liberals voting for more enforcement, more police, more and tougher enforcement, more prisons.

When we get back in this crime bill, I hope we would move back to the regional prison concept along the lines I originally proposed it, as opposed to what it is now. My view is people who are addicted should be in treatment in jail or in treatment out of jail, but in treatment. And where I got that little lesson from—it is strange for the public to hear this—was not from treatment officials, not from sociologists, not from folks who you would expect to talk about treatment, but from my close association with all the police agencies, the cops.

The cops are saying, hey, what in hell are you guys doing? Why don't we have in my city—I have X number, 10,000 or 100,000 people knocking on the door saying I have got a problem, I want to get into a treatment program, and they get told by the agency they have to wait 6 months. So what in the heck are they doing to me? They go out and commit their number of crimes they need to sustain their habit, because you either get off the junk or you go get the money to get the junk, one of the two.

So it is police agencies that have been talking to me about more drug treatment. An interesting statistical, and this is "Does Drug Treatment Work?" In the first year before people get into treatment, you have half the people who need treatment committing crime. After 3 months in treatment, that number of people committing crime who are in treatment, who are users, drops to less than 1 person out of 10 who are in the treatment program.

By the time you get 3 to 5 years out in a follow-up from a residential treatment program, you have 3 people out of 10 who were in treatment committing crime. So let me say this again: People, a year before they go into treatment, 6 out of 10 of them are committing crime; 5 years after they have been out, 3 to 5 years after going through a treatment program, the national average is 3 out of 10 are committing crimes.

Now, people would say how do you measure whether a treatment program is a success or a failure, and they basically, when it comes to treatment, argue that you have to be able to show that everybody that has gone through treatment, came out of treatment and did not use drugs again. Well, if we held any other program to that standard, we would have no education in America. Every State high school system would shut down. How many high schools in the Congressman's district or in my State graduate 98 percent of

the people who go into the high school system? The nationwide average is closer to 62 percent or 68 percent. In some cities, it is down as low as 35 or 40 percent. We do not say, by the way, close the high schools, because they do not graduate people.

Well, how many cops would it take, if theoretically you got every hardcore addict into treatment in prison serving his or her time, or out of prison where they have not committed a crime or been convicted of committing a crime, if to reduce the total number of crimes committed by addicts by 50 percent? It would take a whole hell of a lot of cops, wouldn't it?

Mr. CONSTANTINE. The number would be phenomenal.

The CHAIRMAN. And this is a pretty big bang for the buck. So I think we need to change our thinking about does treatment work. What is the measure of working? If I were certain that if I put every addict of the 5.7 million addicts we have out there, if I could wave a wand and they all went into treatment, and I was convinced that they would reduce the crimes committed by 50 percent, I would say that is a pretty good deal.

And this is not, I want to emphasize, what the President is proposing and what I am proposing or DEA is proposing, is not to say you do not put people who commit crimes in jail. The other thing we found out, treatment in prison works almost as good as treatment out of prison. So we should have hardcore addicts, in my view, in prison serving time and being treated or out of prison in treatment.

We released last year 15,000 people from our penitentiaries, of just the Federal system—and we only have 80,000 people in the Federal prison system—15,000 of them last year released addicted to drugs. They were released after serving their time addicted to drugs. They are just accidents waiting to happen. And in the State system, 840,000 people in the system, and we released 200,000 last year addicted to drugs, after having served—well, in the State system they only serve about 40 percent of their time, but serving their time.

So I am anxious to work with you. I have a number of questions that I want to ask. I will not take the time now and I will not expect them to be answered prior to us taking up your confirmation in this committee. But I am going to submit to you half a dozen to a dozen questions that I would like answered for the record. I will let the record remain open for any Senator who has questions for you, as well. Again, your answering them will not be conditioned upon when we take up the nomination in executive session, but I want them for the record, because I want to make sure that, although I have had plenty of chance to talk with you, it is on the record, your views, including we have done thorough investigations in this committee and your background.

We did thorough investigations on the issue that you had to deal with on evidence tampering, as superintendent. I want that all in the record for the record. We are thoroughly satisfied, the minority and majority investigators on this committee, that you are ethically and in every other way qualified for this job, but we do want this on the record.

[See questions referred to under Submissions for the record.]

The CHAIRMAN. I would ask you one last question, and that is: Every one of your predecessors has made themselves available, to use a phrase from another context, on demand, on request, we will say, to this committee. You will find this committee, Democrats and Republicans, have been an ally to your agency, not an impediment. We want to help.

One of the things we have done in the crime bill that we passed in the Senate is notwithstanding the fact that there are some cuts—and I am told by my staff that the DEA argues that the cuts for this coming fiscal year are not cuts in sworn agents. They are cuts in other personnel within the DEA along the lines you suggested you did when you were superintendent of State police.

Notwithstanding that, I love my President. There are places I disagree with he and OMB. I do not think those cuts should take place. We in the crime bill have added \$20 million a year for DEA to be able to hire a total of 200 agents who will work in the field over the next 5 years, and so I hope we will not, in fact, you will not end up facing the dilemma of having to—notwithstanding they may not be agents—curtail your hiring practice or a hiring freeze on agents and/or other necessary personnel in DEA.

We have yet to pass that through the House, and hopefully that will be done soon and on the President's desk with the grace of God and the good-will of neighbors and a little bit of luck by Easter or shortly thereafter. And we have done the same for the FBI. We have added a number of FBI agents in that crime bill.

But I look forward to working with you on deciding on the new drug strategy that we are going to be putting into effect. I will be introducing that bill, which the President is proposing spending an additional \$1 billion to \$13.1 billion for just one year on the drug strategy.

You have a big job ahead of you, Tom. I think the single biggest contribution you could make, if you will pardon my suggesting what I think it might be, will be to further diminish the friction among the various Federal agencies and consolidate the resources available at the Federal level to deal with what you have to deal with, the multi-faceted aspect of the drug problem, which is international enforcement, interdiction and coordination of enforcement here in the United States. And I hope you will take special note of the emphasis that we are putting in the legislation relative to coordinating with rural and suburban police agencies, because they need your help, as I know you know better than I do.

Are there any concluding remarks that you would like to make?

Mr. CONSTANTINE. No. While you were out of the room, I said this was an honor to get this far and to meet people like you, and whatever happens happens. I hope it is successful, but that alone was the thrill.

The only thing I can promise you is that I am honest, I will work hard, I believe in this thing intensely, Senator. I do not think the world has to be as it is today. I think the world can be better. I will do everything I possibly can in that role. I hope I do not disappoint you or the President. I will try not to.

The CHAIRMAN. I am confident you will not, and I am confident that as long as you keep pointing out to people that, in fairness, what the first drug director who worked with DEA pointed out,

none of these answers will come quickly. These problems were a generation in the making. They are going to take time. We are not going to find all the right answers. Hopefully, we are going to winnow down and eliminate that that does not work, and learn more about what does work.

In the meantime, I agree with you, if we just stay at it and change public attitudes, which is the single biggest thing we could do, we have a real shot for making some progress to make sure that more of those kids do not get caught in the drug stream and become part of that hard-core statistic down the road.

I thank you. I thank your family.

Mr. CONSTANTINE. Thank you.

The CHAIRMAN. Congressman, you are very gracious to stay as long as you have. The superintendent is lucky to have the kind of support you have given him and your colleague. I just want you to know that this committee is available to you in any way we can help you, as well. I thank you for being here.

Mr. McNULTY. Thank you, Senator. I think it is very obvious that those of us who come from New York are very proud of Tom, and I hope that you can move with this process as quickly as possible, because I think swift action will accrue to the benefit of the American people.

The CHAIRMAN. I think we can. Thank you all very much.

We are in recess.

[Whereupon, at 12:15 p.m., the committee was adjourned.]

[Submissions for the record follow:]

SUBMISSIONS FOR THE RECORD

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name: (include any former names used.)
 THOMAS ARTHUR CONSTANTINE
2. Address: List current place of residence and office address(es).
 Home: Schenectady, New York 12308
 Work: New York State Police
 Division Headquarters
 Building 22, State Campus
 Albany, New York 12226
3. Date and place of birth:
 Date of Birth: December 23, 1938
 Place of Birth: Buffalo, New York
4. Marital Status: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).
 Status: Married
 Spouse: Ruth Ann Cryan
 Employment: Part-time assistant
 Plaza Day Care
 Van Antwerp School
 1323 Van Antwerp Road
 Niskayuna, New York 12309
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.
 Erie County Community College
 Williamsville, New York, 9/66 - 6/68,
 A.A.S. Degree in Police Science on 6/68
 State University College at Buffalo
 Buffalo, New York, 9/68 - 6/70
 B.S. Degree in Criminal Justice on 6/70
 State University of New York at Albany, School of
 Criminal Justice, Albany, New York, 9/70 - 6/71
 M.A. Degree in Criminal Justice on 6/71

State University of New York at Albany, School of Criminal Justice, Albany, New York, 9/71 - 6/74
 Doctoral Program - Academic courses and qualifying examinations completed - did not complete dissertation.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.
- | | |
|--------------|--|
| 1/60 - 12/61 | Deputy Sheriff, Erie County Sheriff's Department, Buffalo, New York |
| 1/62 - 6/66 | Uniform Trooper, New York State Police assigned to varied patrol assignments throughout State of New York |
| 6/66 - 5/68 | Investigator, Bureau of Criminal Investigation, New York State Police, Athol Springs Barracks in Buffalo, New York |
| 5/68 - 9/70 | Investigator, Bureau of Criminal Investigation, New York State Police assigned to Narcotics and Major Crimes Unit for Troop A (Western part of New York State) |
| 9/70 - 8/71 | U.S. Justice Department, Executive Development Fellowship to attend Graduate School at State University of New York at Albany |
| 9/71 - 3/74 | Lieutenant - New York State Police Academy, Officer in Charge of Recruit Training |
| 3/74 - 8/76 | Lieutenant - Executive Officer of the Statewide Organized Crime Task Force, Albany, New York |
| 8/76 - 11/78 | Captain - Detail Commander of the Statewide Organized Crime Task Force, Albany, New York |

11/78 - 9/79	Major - Troop Commander, Troop G, Loudonville, New York
9/79 - 8/81	Staff Inspector, Employee Relations, State Police Headquarters, Albany, New York
8/81 - 9/83	Lieutenant Colonel, Employee Relations, State Police Headquarters, Albany, New York
9/83 - 12/86	Colonel - Field Commander, State Police Headquarters, Albany, New York
12/86 - present	Superintendent, New York State Police

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

9/57 - 3/62	United States Army National Guard - 106th Artillery, SP4 - E4, 21-991- 448; Honorable Discharge
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8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Western New York Judges Conference Scholarship (1968)

U.S. Justice Department Executive Development
Fellowship (1971)

Distinguished Alumnus, State University College at
Buffalo (1976)

Distinguished Alumnus, Rockefeller Graduate School,
State University at Albany (1986)

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

None - not applicable

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

New York State Chiefs of Police

International Association of Chiefs of Police*

Police Executive Research Forum

Niskayuna Rotary

*At present I am the Fourth Vice President of the International Association of Chiefs of Police. I will resign from that office upon confirmation.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Not applicable.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

"Operation Safe Bus," The Police Chief, July 1993

"Community Narcotics Enforcement Teams," The Police Chief, October 1991

"Drug Wars: Why Legalization Won't Work," The Police Chief, May 1990

"The National Maximum Speed Limit: New York as a Case Study," The Police Chief, July 1988

"Organized Crime: The New York State Police Response," The Police Chief, January 1988

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. Physical exam as of May 5, 1993.

14. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Appointed.

1960 - 1961 - Deputy Sheriff, Erie County, New York

1962 - present - New York State Police

15. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:
 1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;
 2. whether you practiced alone, and if so, the addresses and dates;
 3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;
- b.
 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?
 2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.
- c.
 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

2. What percentage of these appearances was in:
 - (a) federal courts;
 - (b) state courts of record;
 - (c) other courts.
3. What percentage of your litigation was:
 - (a) civil;
 - (b) criminal.
4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.
5. What percentage of these trials was:
 - (a) jury;
 - (b) non-jury.

The nominee is not an attorney. Therefore, the questions in this section are not applicable to the nominee.

16. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case.

This question is not applicable to the nominee.

17. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

The most significant activities I have pursued relate directly to a life-long career in law enforcement, primarily with the New York State Police. Since January of 1962 when I first entered the State Police as a Uniform Trooper, I have progressed to become the first Superintendent to be appointed from the ranks in over thirty years. The greatest portion of my career was spent in front-line or command assignments, often in the areas of

major violent crimes, narcotics and organized crime investigations. In that same period of time, I commenced and continued a college education in my off-duty hours, starting with a high school diploma and concluding with a Masters' Degree and have completed course work in the Doctoral Program.

As the Chief Executive Officer of the New York State Police, I direct the operation of a 4,800 person full-service law enforcement agency that is one of the ten largest police departments in the United States. The New York State Police, working with a \$266,000,000 annual budget, provides uniform patrol service to rural and many suburban communities. In addition, our State Police Bureau of Criminal Investigation consisting of 900 plainclothes investigators is responsible for such varied tasks ranging from the investigation of violent crime and serial murders for most of Upstate New York to large organized crime and narcotics units within the major cities of our State.

Since becoming Superintendent in 1987, I have implemented a number of major programs dedicated to narcotics enforcement. In fact, the New York State Police Narcotics Unit of 350 personnel is now second in size only to the New York City Police Department of all the state and local police departments in the United States. The first level of our strategy is directed against the major international narcotics cartels operating in our State. One such State Police investigation of the Cali Cartel has resulted in the indictment of over 205 major principals in the Cartel, the seizure of six tons of cocaine, the seizure of 38 million in cash and the solution of numerous drug related homicides. In addition, the State Police has led the attack on major illegal drug laboratories operated by the Cali Cartel in Upstate New York locations. The second level involves the investigation of mid-level narcotics groups operating in the Upstate cities with a priority on those groups that use violence. The last strategy is a unique innovation of the New York State Police directed against street-level dealers who cause so much chaos in our urban neighborhoods. The State Police Community Narcotics Teams consist of 90 young Troopers from diverse backgrounds who are made available as undercover teams to local police chiefs, sheriffs and district attorneys. The assignments are prioritized to communities experiencing a great deal of violence and emphasize cooperation by ensuring that local officials control all of the public recognition of the operation. This new unit has been successful in most of our major urban areas and has resulted in local citizens literally coming out of their homes to applaud and thank the Troopers at the time of the arrests.

One of the major programs I have emphasized during my tenure is the sophisticated investigation of the increasing amount of random and serialized violent crime. The State Police instituted a special computer program to track serial murderers and rapists, trained special criminal profilers, hired forensic medical examiners; and since 1987, we have conducted the preeminent homicide seminar in the United States. As a result of our homicide seminar, we have trained over 1,000 investigators from throughout the United States and Europe. In the past five years the New York State Police has become the nation's expert on serial murders and has solved over 40 such crimes. In 1992 Governor Cuomo recognized the New York State Police for the Excelsior Award as the state agency which, among all others, provided the best quality service to the citizens of New York State.

In addition to my responsibilities as Superintendent of the New York State Police, I have been active in a number of professional organizations, primarily the International Association of Chiefs of Police. In 1989 I was selected by all of the State Police and Highway Patrols in the United States and the Provincial Canada to be their General Chairman. In 1992 I was elected unopposed to become a Vice President on the board of the 13,000 member International Association of Chiefs of Police. In 1993 I chaired the IACP Summit on Violent Crime that included representatives of every major police organization in the United States. The resultant report has proved to be a blueprint for a number of federal and state initiatives on violent crime. Two copies of which are attached.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.
 - A. The nominee is a thirty-two year veteran of the New York State Police and, as such, is a member of the New York State Police and Fire Retirement System. At such time as the applicant leaves State service, I will be eligible for a service retirement. The amount of that retirement will be based on years of service and the option selected. These decisions will be made on the date of retirement.
 - B. The nominee is also a member of a state-sponsored deferred compensation program. At time of retirement, I will make decisions regarding these investments. However, at present, I plan to leave the investment in the current program.
 - C. I have an Individual Retirement Account invested in a Certificate of Deposit at the State Employees Federal Credit Union in Albany, New York. At present, I plan to leave the investment in this account.
2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

There does not appear to be any conflict of interest that would arise from my New York State service retirement or deferred compensation program and employment with the federal government.

I will seek and follow the advice of the Department of Justice Ethics officials before participating in any matter that could effect the financial interest of any member of my family and recuse myself if necessary.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service in the position to which you have been nominated? If so, explain.


No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, fits, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

Attached is a copy of the Financial Disclosure Report filed on 12/23/93.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for). See attached.
6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

No

Reporting Status <input type="checkbox"/> Incumbent <input checked="" type="checkbox"/> New Appointment, Reappointment, or Promotion (Month, Day, Year) 1/1/92 - 12/31/92		Calendar Year Covered by Report 1/1/92 - 12/31/92		Termination Date (If Applicable) (Month, Day, Year)		Agency Use Only	
Reporting Individual's Name LAST FIRST CONSTANTINE		First Name and Middle Initial THOMAS A		Termination Date (If Applicable) (Month, Day, Year)		Agency Use Only	
Position for Which Filing ADJUSTER		Title of Position ADJUSTER		Department or Agency (If Applicable) DCA 6 F.A.R.E.E.M.S.T. ADJUSTER		Fee for Late Filing Any individual who is required to file this report and does so more than 30 days after the date the report is required to be filed, or, if an extension is granted, more than 30 days after the last day of the filing extension period shall be subject to a \$200 fee.	
Location of Present Office (or temporary address) N.Y. STATE POLICE, 840422, STATE CAPITAL, 12212		Address (Number, Street, City, State, and ZIP Code) N.Y. STATE POLICE, 840422, STATE CAPITAL, 12212		Telephone No. (If Available) 518-457-6721		Reporting Periods Incumbents: The reporting period is the preceding calendar year except Part II of Schedule C and Part I of Schedule D where you must state the reporting period of the date you filed. Part II of Schedule D is not applicable.	
Disqualifying Positions Subject to Sworn Confirmation SENATE JUDICIARY		Name of Congressional Committee Considered Nominations SENATE JUDICIARY		Do You Intend to Create a Qualified Person's Trust? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		Termination Filers: The reporting period begins at the end of the period covered by your previous filing and ends on the date of filing of Part II of Schedule D is not applicable.	
Certification I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge and belief.		Signature of Director (Individual) 		Date (Month, Day, Year) 12/23/93		Nominees, New Entrants and Vice President:	
Other (If not by agency)		Signature of Other Director		Date (Month, Day, Year)		Schedule A: The reporting period for income (SCHEDULE C) is the preceding calendar year. The reporting period for assets is as of any date you choose that is within 31 days of the date of filing.	
Agency Ethics Officer's Opinion The information contained in this report does not violate any laws and regulations.		Signature of Designated Agency Ethics Officer (If not by agency)		Date (Month, Day, Year)		Schedule B: Not applicable.	
Office of Government Ethics Use Only		Signature		Date (Month, Day, Year)		Schedule C, Part I (Liabilities): The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing.	
Comments of Reporting Office (If additional space is required, use the reverse side of this sheet)		Signature		Date (Month, Day, Year)		Schedule C, Part II (Agreements or Arrangements): Show any agreements or arrangements as of the date of filing.	
Comments of Reporting Office (If additional space is required, use the reverse side of this sheet)		Signature		Date (Month, Day, Year)		Schedule D: The reporting period is the preceding two calendar years and the current calendar year up to the date of filing.	

If two lines of information are maintained on the reverse side.

SCHEDULE A

 Page Number
 1

Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.

Valuation of Assets at close of reporting period

Assets and income

BLOCK A

BLOCK B

BLOCK C

Identify each asset held for the production of income which had a fair market value exceeding \$1,000 at the close of the reporting period.	None (or less than \$1,001)	Amount										Type	Other (Specify Type)	None (or less than \$201)	Actual Amount Only if "Other" specified	Date (Mo., Day, Yr.) Only if honoraria																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																							
		Over \$1,001,000	\$500,001 - \$1,000,000	\$250,001 - \$500,000	\$100,001 - \$250,000	\$50,001 - \$100,000	\$1,001 - \$50,000	\$201 - \$1,000	\$1,001 - \$2,500	\$2,501 - \$5,000	\$5,001 - \$15,000																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																												
Identify each asset or source of income which generated over \$200 in income during the reporting period.	None <input type="checkbox"/>	Over \$1,001,000	\$500,001 - \$1,000,000	\$250,001 - \$500,000	\$100,001 - \$250,000	\$50,001 - \$100,000	\$1,001 - \$50,000	\$201 - \$1,000	\$1,001 - \$2,500	\$2,501 - \$5,000	\$5,001 - \$15,000	Qualified Trust	Excepted Trust	Excepted Investment Fund	Capital Gains	Interest	Rent and Royalties	Dividends																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																					</

Reporting Individual's Name
THOMAS A. CONSTATINE

SCHEDULE B New Entry/Nominee/Candidate:
Schedule Not Applicable

Page Number

1

Part I: Transactions

Report any purchase, sale, or exchange by you, your spouse, or dependent child during the reporting period of any real property, stocks, bonds, commodity futures, and other securities when the amount of the transaction exceeded \$1,000. Include transactions that resulted in a loss. Do not report a transaction involving property used solely as your personal residence, or a transaction solely between you, your spouse, or dependent child. Check the "Certificate of divestiture" block to indicate sales made pursuant to a certificate of divestiture from OGE.

None ☐

Line Number	Description of Asset	Identification of Asset	Purchase Date (Mo./Day/Yr.)	Sale Date (Mo./Day/Yr.)	Divestiture Date (Mo./Day/Yr.)	Amount of Divestiture (U.S. Dollars)	Certificate of Divestiture Number
1	Example: General Airline Company						
2							
3							
4							
5							
6							

Part II: Gifts, Reimbursements, and Travel Expenses

Report the source, a brief description (including travel, dates, and the nature of expenses provided), and the value of (1) gifts received from any source other than your spouse or dependent child; (2) cash reimbursements of \$200 or more received as personal expenses; and (3) other gifts from one spouse or dependent child that were given solely independent of the relationship to you. See instructions for further exclusions.

None ☐

Line Number	Source (Name and Address)	Brief Description	Value
1	Example: Nat'l Assoc. of Book Collectors, NY, NY Nat'l Assoc. of Book Collectors, NY, NY	Airfare ticket, hotel room & meals incident to national conference 01/02/90 Latter includes for national president	\$500 \$125
2			
3			
4			
5			

Previous Editions Cannot Be Used

THEODORE A. GUSTAFSON		SCHEDULE D	Page Number 1
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Part I: Positions Held Outside U.S. Government

Report any position held during the applicable reporting period, whether or not the position is paid, and whether the position is for a non-profit, profit, or other business enterprise, or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

None ☐

Examples	Position (Where and Address)	Type of Organization	Position Held	From (Mo, Yr)	To (Mo, Yr)
	Don Jones & Smith, Hometown, USA	Non profit education	President	1980	Present
1		Law firm	Partner	1980	1981
2	NEW YORK STATE POLICE, ALBANY NY	Law Enforcement	Supervisor	2/87	Present
3	VICE PRESIDENT INTERNATIONAL ASSN. OF POLICE, ALBANY, NY	Professional	Vice President	1982	Present
4					
5					
6					

Part II: Compensation In Excess Of \$5,000 Paid by One Source

Report sources of more than \$5,000 compensation received by you or your business affiliation for services provided directly by you during the reporting period. This includes the names of clients and customers of any corporation, firm, partnership, or other business enterprise, or any non-profit organization when you directly provided the services generating a fee or payment of more than \$5,000. You need not report the U.S. Government as a source.

Incumbent/
 Termination Filer/
 Candidate: ☒
 Not Applicable ☐

None ☐

Examples	Source (Name and Address)	Legal services	Benefit Description of Duties
	Don Jones & Smith, Hometown, USA	Legal services	Legal services of corporation with university foundation
1	NEW YORK STATE POLICE, ALBANY NY		Supervisor - NEW YORK STATE POLICE
2			
3			
4			
5			
6			

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			LIABILITIES		
Cash on hand and in banks	9,500	00	Notes payable to banks—secured	6,000	00
U.S. Government securities—odd schedule			Notes payable to banks—unsecured		
Listed securities—odd schedule			Notes payable to relatives		
Unlisted securities—odd schedule			Notes payable to others		
Accounts and notes receivable:			Accounts and bills due	600	00
Due from relatives and friends			Unpaid income tax		
Due from others			Other unpaid tax and interest		
Doubtful			Real estate mortgages payable—odd schedule	20,000	00
Real estate owned—odd schedule	140,000	00	Chattel mortgages and other liens payable		
Real estate mortgages receivable			Other debts—itemize:		
Autos and other personal property	15,000	00			
Cash value—life insurance					
Other assets—itemize:					
WYS Deferred Compensation	70,000	00			
IRA State Employees	20,000	00			
Credit Union			Total liabilities	26,600	00
Home Furnishings	15,000	00	Net worth	242,900	00
Total assets	269,500	00	Total liabilities and net worth	269,500	00
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, cosigner or guarantor	None		Are any assets pledged? (Add schedule.)	No	
On leases or contracts	None		Are you defendant in any suits or legal actions?	Yes*	
Legal Claims	None		Have you ever taken bankruptcy?	No	
Provision for Federal Income Tax	None				
Other special debt	None				

*Official capacity only.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

Although as a layman I am not governed by Canon 2 of the ABA Code of Professional Responsibility, I have attempted in my personal and professional life to assist the disadvantaged. Some examples:

Since 1987, I have been the co-chair of the Statewide Law Enforcement Torch Run for the New York State Special Olympics Program. The police run organizes law enforcement officers who carry the Special Olympics torch from the tip of Long Island to Western New York. The New York State Special Olympics Foundation then arranges for contributions on each leg of the run to provide funding for training and the actual events. The program supports athletic competition for children and adults with mental retardation and developmental disabilities.

As Superintendent of the State Police I have implemented several programs dedicated to drug prevention programs at a number of elementary schools throughout the State. The program is New York State Police "LEARN" where specially trained Troopers visit middle schools throughout the State for two days each semester to deliver drug prevention training. Since its inception in 1987, we have presented the program to 70,141 students at 150 schools.

In addition, the State Police has been actively involved in a New York State program that provides mentors for children with limited financial backgrounds.

I have implemented and supported a summer camp program at the State Police Academy that affords an opportunity for approximately 200 children selected from throughout the State to spend a week at our academy in Albany, New York. The students are selected based on their financial needs. Each of the students is brought to the Academy by a Uniform Trooper. They each receive free physicals and dental

checkups. If it is necessary, local dentists volunteer to provide remedial care. During the week the students, along with their Trooper Counselors, attend a variety of athletic, social and cultural events.

As a member of the Wiskayuna Rotary I engage in volunteer fund raising programs to support scholarship programs for students in need of financial support.

I have been a scoutmaster of a Cub Scout troop and volunteered as a coach of the Jaycee Little League in Schenectady, New York.

I have been a vice president and coach in the Schenectady Babe Ruth League and managed and coached the Catholic Youth Organization basketball programs for St. Helen's Parish in Schenectady, New York.

2. Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex, or religion — through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

I do not or have I ever belonged to such an organization.

Iatrogenic Government

Social Policy and Drug Research

DANIEL PATRICK MOYNIHAN

WRITING IN THE *New England Journal of Medicine* in 1983, Armand M. Nicholi of the department of psychiatry at Massachusetts General Hospital and the Harvard Medical School commented:

When future historians study American culture, they may be most perplexed by the explosive increase in the nonmedical use of drugs that occurred during the seventh and eighth decades of this century. This widespread increase in the illicit use of psychoactive drugs began in the early 1960s, primarily in colleges and universities, during an era of unprecedented campus disorder and social upheaval. For the next 10 years studies were focused on patterns of drug use among college students—the late-adolescent and young-adult age groups. Perhaps because of the strong influence youth exerts in establishing the tone of our culture with respect to music, dress, and lifestyle, the nonmedical use of drugs spread rapidly to other age groups, and during the 1970s it reached epidemic proportions.

When these future historians set to work, one matter need not perplex them. If they should ask—and let us hope they do—did anyone in the medical profession, observing the onset of this epidemic, set out in a scientific manner to try to understand what was happening and to develop an appropriate medical response, the answer will be that there was one such person, Norman Zinberg, professor of psychiatry at the Harvard Medical School. He was, in the most profound sense, a healer, a life-enhancing man.

Although Zinberg's major work, *Drug, Set, and Setting*, was not published until 1984, his papers and lectures were well and widely known by the mid-1960s. At that time I was director of the Joint

❖ DANIEL PATRICK MOYNIHAN is the senior United States Senator from New York. He is the author of numerous books, most recently, *Pandemonium: Ethnicity in International Politics*.

Center for Urban Studies of M.I.T. and Harvard. We were neighbors and became friends, and I, in a legitimate sense, became his pupil. In 1969, I went to Washington as an adviser on urban affairs to President Nixon. The urban crisis, as it was known at that time, was very much a drug crisis, chiefly entailing heroin. Early on it fell to me to try to fashion a response by the federal government. This was perhaps the first time the federal government had attempted a deliberate relationship between social policy and drug research. This is also the subject of the final chapter in Norman Zinberg's *Drug, Set, and Setting*.

My first foray into the field came in August 1969, after the president had sent to Congress a considerable legislative program that addressed urban matters. In this program, the welfare system was to be replaced by a guaranteed income, known as the Family Assistance Plan. The federal government would share its revenue with state and city governments. Now was the time for drugs. At that time most of the heroin used here was coming in from Marseilles, where it was refined from Turkish opium. I set out for those countries to tell their officials and our own embassies (which seem never to have heard of the subject) that the United States could not accept "the French connection."

After a scattering of heroin-related deaths among French youths, *Le Monde* published an article ascribing drug addiction to broken homes and the National Assembly had a day-long debate on the subject. The French took the matter far more seriously than we had ever done, and before long Marseilles was clean, as the argot has it. ~~Having reached tentative agreements,~~ I found myself in a helicopter flying up to Camp David to report on this seeming success. The only other passenger was George P. Shultz, who was busy with official-looking papers. Even so, I related our triumph. He looked up. "Good," said he, and returned to his tables and charts. "No, really," said I, "this is a *big* event." My cabinet colleague looked up, restated his perfunctory "Good," and once more returned to his paperwork. Crestfallen, I pondered, then said, "I suppose you think that so long as there is a demand for drugs, there will continue to be a supply." George Schultz, sometime professor of economics at the University of Chicago, looked up with an air of genuine interest. "You know," he said, "there's hope for you yet!"

As indeed there was: both for me individually and for the federal government as it once again engaged itself with the matter of drugs. Early in December 1969, a governors' conference was convened to address the issue. At a luncheon at the Department of State I was the principal speaker. I do not suggest that my views were held uniformly

IATROGENIC GOVERNMENT

throughout the administration, but there I was, Counselor to the President, telling the governors what *I* thought—a point of view that they had reason to believe was close to what others like me thought. The truth in either event is that we were mostly asserting what we did not know and would need to learn.

I called my paper "The Whiskey Culture and the Drug Culture." I had a simple theme.

Let me offer one general idea. Drug use—and abuse—represents simply one more instance of the impact of technology on society. This is the central experience of modern society. At one or two removes, most of the ills we suffer are the consequences of technology. That is to say, the *bad* results that accompany the *good* ones—good results which led to the adoption of the technology in the first place. A commonplace observation, but truly an important one, and one which will I think be recognized by Governors who struggle daily with waters polluted by technology, underprivileged populations displaced by technology, drivers and pedestrians maimed by technology, cities choked with technology, and air fouled by it. Not to mention urban populations near to terrorized by crime brought about by the need to obtain money to purchase certain drugs which are yet another product of technology. From nuclear weapons to cyclamates, this is what is so unsettling about modern life. The effort to master and somehow transcend technology is central to the concerns of the great philosophical historians and sociologists of the age, men such as Jacques Ellul, Lewis Mumford, David Riesman, Michael Young. But for the moment one of the tasks of government is to keep technology from rending the fabric of society. That is what this conference is about, the specifics of which I would like now to consider.

I discussed in some detail the extraordinary destructiveness of distilled alcohol when it first became available in the eighteenth century as a combined result of the renaissance invention of distillation and the later agricultural revolution that produced an abundance of grain. The species had no experience with an intoxicant of this power. In his fine study, *Town Planning in London: The Eighteenth and Nineteenth Centuries*, Donald J. Olsen identified the onset of distilled spirits as a form of social pathology: "Cheap gin helped to keep the population of London stable from 1700 to 1750."

In truth, the numbers are astonishing. M. C. Bauer estimated the population in 1700 to have been 674,000 and fifty years later to be no more than 676,000. By contrast the population of London tripled in the first half of the *following* century, going from 864,845 in the census of 1801 to 2,363,236 in 1851. Ought we not to think that a form of social learning was taking place—at a time of robust laissez-faire government—and the population was coming to terms with this new product of technology.

W. J. Rorabaugh's *The Alcoholic Republic: An American Tradition*

would not appear for another decade, but enough of the American experience was available to provide some useful generalizations. The first law enacted by the first Congress established the oath of office required by Article VI of the Constitution. To wit: "I, A.B., do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States." The second law imposed a ten-cents-per-gallon tariff on Jamaican rum—to encourage consumption of American whiskey. This was a general tariff bill, but it is noteworthy that six of the first seven items concern drink.

- On all distilled spirits of Jamaica proof, imported from any kingdom or country whatsoever, per gallon, ten cents.
- On all other distilled spirits, per gallon, eight cents.
- On molasses, per gallon, two and a half cents.
- On Madeira wine, per gallon, eighteen cents.
- On all other wines, per gallon, ten cents.
- On every gallon of beer, ale or porter in casks, five cents.
- On all cider, beer, ale or porter in bottles, per dozen, twenty cents.

Distilled spirits in early America appeared as a font of national unity, easy money, manly strength, and all-round good cheer. It was at first irresistible. It felt good and was thought to be good for you. The more the better. It became routine to drink whiskey at breakfast and to go on drinking all day. (Laborers digging the Erie Canal were allotted a quart of Monongahela whiskey a day, issued in eight four-ounce portions commencing at six o'clock in the morning.) Only slowly did it sink in that such a regimen was ruinous to health and a risk to society. When it did, society responded.

Apart only from the movement to abolish slavery, the most popular and influential social movement of nineteenth-century America concerned the effort to limit or indeed prohibit the use of alcohol. The former brought about three amendments to the Constitution; the latter, two. In *Thinking About Crime* (1983), James Q. Wilson estimates that by the end of the nineteenth century the temperance movement had reduced per capita alcohol consumption by two-thirds. Alcohol abuse continues to be a major health problem—and a murderous one in combination with that other technological wonder, the automobile. But at least the dangers of alcohol are far better understood than in the past.

The use of what might be termed high-proof drugs appears roughly a century later than the use of high-proof alcoholic drink. Just as beer and wine are naturally fermented products of grain and grapes, narcotics and stimulants appear in nature as attributes of the

IATROGENIC GOVERNMENT

poppy or coca plant. The crucial technological event here was the development of organic chemistry in German universities in the middle of the nineteenth century.

First, morphine was produced from opium. In combination with the hypodermic needle, morphine was widely used in Civil War medicine, giving rise to a form of addiction that was popularly called Soldier's disease. (The medical use of morphine in childbirth evidently led to similar forms of addiction.) A generation later, heroin, a "distillation" of morphine, was developed by the Bayer Pharmaceutical firm in Germany. (Employees on whom it was tested found that it made them feel *heroisch*—hence, its trade name.) It appears to have been thought useful as a cure for morphine addiction.

In like manner, cocaine, the active ingredient of the coca leaf, was isolated before 1880. Its early use was medical, again in association with the hypodermic needle. Freud used it to treat a friend suffering from morphine addiction. As he increased the doses, he induced an episode of cocaine psychosis and, as reported by Oakley S. Ray in *Drugs, Society, and Human Behavior* (1978), "thereafter was bitterly against drugs." On the other hand, in 1885, the Parke-Davis Pharmaceutical Company asserted that cocaine "can supply the place of food, make the coward brave, the silent eloquent" and declared it a "wonder drug."

Along with alcohol, these substances came under federal prohibition early in this century. Alcohol prohibition was a convulsive event that, among other things, led to the creation of a criminal underworld of exceptional influence and durability. There was always a certain amount of drug trafficking within this underworld, and this continued at modest levels until the epidemic outbreak of heroin use in the 1960s. It thereupon provided the model on which the large-scale import and distribution of drugs commenced in the 1960s.

Rereading my little-noticed and long-forgotten paper is rewarding—to me, at any rate—in the way it reveals the iron incompatibilities that beset anyone who tries, however tentatively, to derive drug policy from drug research, and for that matter social science. Here I would invoke the wonderfully allusive remark of Rudolph Virchow, the eminent nineteenth-century pathologist. "Medicine," he said, "is a social science, and politics is nothing but medicine on a grand scale." As I developed first this argument, then that analogy, I kept running up against the fact that our society had made a political choice between two almost equally undesirable outcomes. As Mark A. R. Kleiman spells out in his fine new study, *Against Excess: Drug Policy for Results*, in dealing with drugs, we are required to choose between a crime problem and a public health problem. In choosing to prohibit

drugs, we choose to have a more or less localized—but ultimately devastating—crime problem rather than a general health problem. Kleiman writes:

The case for heroin prohibition is simply that a number, probably a large number, of persons who now lead reasonably satisfying, dignified, and useful lives would, if heroin were legal, find themselves leading, and regretting, lives with a narrowed range of satisfactions, impaired dignity and self-command, and reduced usefulness to their families, friends, neighbors, coworkers, and fellow citizens. To prevent this we pay a price in a form of increased misery for those who become heavy heroin users despite prohibition, and increased external costs: the spread of disease, user crime, black-market crime, neighborhood disruption from open dealing, and the expenditure of law enforcement resources that could instead be used to suppress predatory crime.

Then, as now, I opposed legalization, or decriminalization of drugs. I took the technological ascent seriously. In his *Letters from an American Farmer* published in 1782, J. Hector St. John de Crèvecoeur notes his surprise at a "singular custom" among the good, and presumably Puritan ladies of Nantucket: "They have adopted these many years, the Asiatic custom of taking a dose of opium every morning. . . . This is much more prevalent among the women than the men."

But opium is one thing; heroin another. My 1969 paper concluded:

There are those who will and do propose a social policy of complete and free availability of almost all chemical substances that are or can be ingested in one form or another. In its most popular form today, this takes the form of advocating the free use of cannabis, and somewhat less frequently, the free, or mildly regulated use of heroin. I believe this to be a very mistaken position. It is a form of hiding behind the principle of individual freedom to avoid the reality of individual danger and individual harm. It is almost a form of indifference to pain: and I say that in full knowledge of the generosity of spirit and the effort to be understanding that often motivates such proposals.

Our object must be higher. We must learn to use fewer drugs, not more. The question of course is how?

That was pretty clear twenty-three years ago when we were just entering our current federal preoccupation with illicit drugs—or rather, with drugs the federal government has declared illicit. I had put it to the governors:

We have had drug prohibition for fifty-five years now. And here we are at this conference. Not exactly a record of success. What are we to learn? The first thing, obviously, is that this is not an easy problem. Men as good as us or better have struggled, and by all outward indices, they have failed.

IATROGENIC GOVERNMENT

There was not going to be any cheap way out of this. Technology has unleashed an enormous social agent that threatens us in the most serious way. This problem now involves "the structure of authority and governmental legitimacy in America." Are the laws obeyed? Does the state maintain a monopoly on violence? If not, what kind of state have we?

This is where Norman Zinberg entered what, at least, were my calculations. Here is one last passage from the State Department address.

Dr. Norman Zinberg has, it seems to me, most helpfully described the drug phenomenon in terms of a triangle of "Drug, Set, and Setting." That is to say we need to know so much more about the interaction of a particular chemical, a particular individual, and the social (or anti-social) context in which the two come together. This is very like the epidemiological triad, and deserves the most careful attention and serious research. Until very recently most drug users have been treated in terms of medical or criminal categories. Drug users were treated as deviants. Benignly so in the case of the Civil War opium addicts swilling away at patent medicines to cure what was known as "Soldier's illness," or punitively so as in the case of the heroin addict of the slum, supporting his habit by thievery or worse, and in agonizing numbers ending his life by what society prefers to diagnose as an "overdose" of whatever it is that ailed him.

A near quarter century has passed. Nothing much has happened. There has been precious little research, with as yet precious little by way of result on that epidemiological triad. Thanks to Vincent Dole and Marie Nyswander we have methadone treatment, but that was already in place when the federal government entered its current war on drugs.

At the risk of propounding what I cannot prove, let me suggest that in considerable measure this is the result of a disinclination within the medical profession to engage itself with drug research. In the preface to *Drug, Set, and Setting*, Zinberg notes that the train of thought that led him to his subject began in 1962 in Beth Israel Hospital, where, making rounds with non-psychiatric physicians, he "began to puzzle over the extreme reluctance these sensible physicians felt about prescribing doses of opiates to relieve pain." Concern about iatrogenic addiction established the social setting that Zinberg would go on to elaborate. He noted "the strength of Puritan moralism in American culture which frowns on the pleasure and recreation provided by intoxicants." Whatever the causes, and they are surely multiple, it is clear to this observer that the medical profession finds drug research aversive behavior.

As an example of our most recent affliction, take "crack" cocaine. This is typical of an ascent on the technological ladder: beer to whis-

key; opium to morphine to heroin; coca to cocaine and now to this most potent possible form of "free-base" cocaine. Crack differs only in being the result of folk science rather than the work of bearded professor-doctors in German laboratories. (Although, come to think of it, Highland single malt was probably a similar, if more welcome, discovery.) Crack first appeared in the Bahamas. By 1985, a Bahamian physician warned that an epidemic was about to strike his offshore islands. This item appeared in the *Atlanta Journal* of December 31, 1985:

NASSAU, BAHAMAS — A highly addictive practice of smoking cocaine "rocks" has swept this chain of islands off the coast of Florida.

In a country of 230,000 people, the number of cocaine users treated at mental health clinics has zoomed from zero in 1982 to 209 in 1984, according to Dr. David Allen, a Harvard-trained psychiatrist who heads the National Drug Council.

"What we have [Dr. Allen said] is the world's first free-basing epidemic [which] could be preceding an epidemic in the industrialized states. Anywhere there is readily available high-quality cocaine, there is this potential."

Here was a psychiatrically trained epidemiologist telling us that an epidemic was coming our way. But such is the low status of drug research that, so far as I have been able to learn, apart from a single sentence of a 1982 issue of the Centers for Disease Control publication, *Morbidity and Mortality Weekly Report*, there was no official response anywhere in the vast organizational network that was by now carrying out the war on drugs. The first medical report appeared in the British journal the *Lancet* in a 1986 article by Dr. Allen and others entitled "Epidemic Free-Base Cocaine Abuse: Case Study from the Bahamas."

This was the situation when Congress returned to the subject of drugs in 1988. Society had had two bad breaks during that decade: the sudden onset of AIDS and the appearance of crack in settings of lethal proximity. The public demanded action, or at least the appearance of action, or so at least loud political voices declared. On May 17, 1988, Senate Majority Leader Robert S. Byrd established a working group on substance abuse, to be co-chaired by Senator Sam Nunn of Georgia and me. Interdiction and crackdown were then all the rage. (A law providing the death penalty for "kingpins" reached the president's desk months before ours did. It was promptly signed.) My role on the working group was to assert—quietly, so as not to disturb the public peace—that, other than to raise the price of drugs somewhat, interdiction was not going to have the slightest effect on supply. This was the maxim George Shultz taught me. Accordingly, any com-

IATROGENIC GOVERNMENT

prehensive legislation should place at least equal emphasis on demand. The lesson Norman Zinberg taught me, the idea that controlled use was possible, even common, led directly to the proposition that treatment could be developed that could move drug users across the line toward abstinence, or as near to abstinence as possible.

I consulted Zinberg. I asked him to coach me on how to make this case. In the end it worked. After an unusually compressed six months of congressional debate, ending with a 65–29 vote in the Senate, the Anti-Drug Abuse Act of 1988 became law on November 18 of that year. Section 2012 sets out the purposes of the law. These include:

To increase to the greatest extent possible the availability and quality of treatment services so that treatment on request may be provided to all individuals desiring to rid themselves of their substance abuse problem.

The legislation established an Office of National Drug Control Policy in the executive office of the President. It was headed by the so-called czar and included a deputy director for supply and a deputy director for demand.

And so the attempt to get drug problems under control began again. And once more it failed to thrive. Czars resigned, which czars are not supposed to do. Deputies departed. Silence fell. Even so, knowledge edged on. Richard Millstein of the National Institute on Drug Abuse notes that scientists have for some time known that by manipulating the opiate molecule it is possible to develop compounds that block or reverse the effects of drugs such as morphine and heroin. For example, naloxone was approved for use in 1971 and is now part of the Emergency Medical Service protocol. A longer-acting narcotic antagonist, naltrexone, was approved for use in 1984. And a time-released “depot” dosage has been found to block the effects of opiate challenges, as doctors say, for up to seven weeks in rhesus monkeys. However, as an internal paper of the National Institute states, while there is an agonist treatment (methadone) and an antagonist treatment (naltrexone) for opiates, no approved medication for the treatment of addiction to cocaine (including the smokable form of cocaine known as crack) currently exists. And crack cocaine is where the problem is centered.

Having said that, a political scientist is honor bound to add that the power of government *or* science to influence behavior is limited. People do or do not get on with their lives. Most do. Here, as an example, is an excerpt from *Tales Out of School*, the autobiography of Joseph A. Fernandez, who until recently was the New York City School Chancellor; this excerpt describes his years as a drug-dependent teenager.

The beginning of my own fateful turnabout came in one night of horror on 135th Street when I was still enrolled at Commerce High. Jimmy Conn (not his name) had become my closest friend during that time, partly because of the experimenting we were doing with heroin. Jimmy was a Scotch-Irish kid from a poor family, with no father at home. Actually, he lived outside the neighborhood, up in the 130's, but we were very close, to the point of swapping clothes to wear.

This particular night we were at somebody's house and got tied into some really potent heroin. I got sick almost immediately, a scary new kind of sickness. I remember saying to Jimmy, "Something's wrong. We gotta get outta here."

By the time we got downstairs to the street, we were both reeling. I can barely remember my friends walking us up and down the sidewalk, trying to keep us from fading out. They probably saved our lives. I was half in and half out for hours. Jimmy came to first. When I finally did, I was scared enough to realize it was time to make a change.

I dropped out of Commerce the following week and enrolled at Textile High, down in Hell's Kitchen, where I didn't know anybody. I could tell immediately it wasn't going to work. I was there only a week and dropped out again.

Norman Zinberg would have thought young Fernandez a pretty hard case. But he would not have been the least surprised that the kid got hold of himself, joined the air force, married a strong woman, got an education, and went on to do serious work. His *setting* changed.

As for our 1988 legislation, it had a brief half-life. William Bennett, the forceful first director of the Office of National Drug Control Policy, was followed by a political appointee with no apparent views on the subject. Dr. Herbert D. Kleber left after two years, and his position has not been filled. Nor has support for treatment been as forthcoming as the legislation indicated it ought to be. Kleber wrote:

Funding for treatment of substance abuse has been a bipartisan failure. Our Republican President has requested substantially less money than is needed; and the Democratic Congress gave him only one-third of what he asked for. The situation in research is not much better, in spite of the desperate need to develop medications to treat cocaine abuse. The House gave the President \$17 million less for research at NIDA [National Institute on Drug Abuse] than he had requested. In fact, the overall increase for NIDA was slightly over 1 percent, one of the lowest if not the lowest of the NIH [National Institutes of Health] institutes. Both government leaders and the general public need to be made aware of the potential promise that can occur by adequately funding treatment and research, and of the many harms to society that will occur if it does not happen.

The recent presidential campaign was only marginally encouraging. The Republican platform was straight out. Ignoring treatment altogether, the GOP chose to fry the kingpins, as the battle cry goes.

IATROGENIC GOVERNMENT

We oppose legalizing or decriminalizing drugs. That is a morally abhorrent idea, the last vestige of an ill-conceived philosophy that counseled the legitimacy of permissiveness. Today, a similarly dysfunctional morality explains away drug-dealing as an escape, and drive-by shootings as an act of political violence. There is no excuse for the wanton destruction of human life. We therefore support the stiffest penalties, including the death penalty, for major drug traffickers.

The Democratic position called for "treatment on demand," which was mildly disappointing since no one seemed to remember that we have already legislated "treatment on request." ("Request" was my term; I thought "demand" sounded too imperious.) The platform read:

Drug treatment on demand: Thousands of addicts have volunteered to take themselves off the streets, only to hear the government tell them that they have to wait six months. In a Clinton Administration, federal assistance will help communities dramatically increase their ability to offer drug treatment to everyone who needs help.

The Democrats won, and so we shall see. My hope is that it will be possible for the generation now coming into its own in the normal rhythm of generational change to be able to recall that drug use first became conspicuous, in *this* cycle, among educated and relatively affluent young persons on college campuses. It is so no longer. Drug use—and in notably destructive forms—is now concentrated in the weakest and least affluent segments of our population. It is inescapably associated with race. Here are some devastating numbers. In 1960 there were 189,733 persons in state prisons; 65 percent were white, 34 percent black. Thirty years go by and, in 1989, there are 610,106 persons in prison, but now 50 percent are black. (In the meantime the racial composition of federal prisons, where there are fewer drug offenders, has changed not at all: in 1960, 71 percent white, 25 percent black; in 1989, 73 percent white, 26 percent black.)

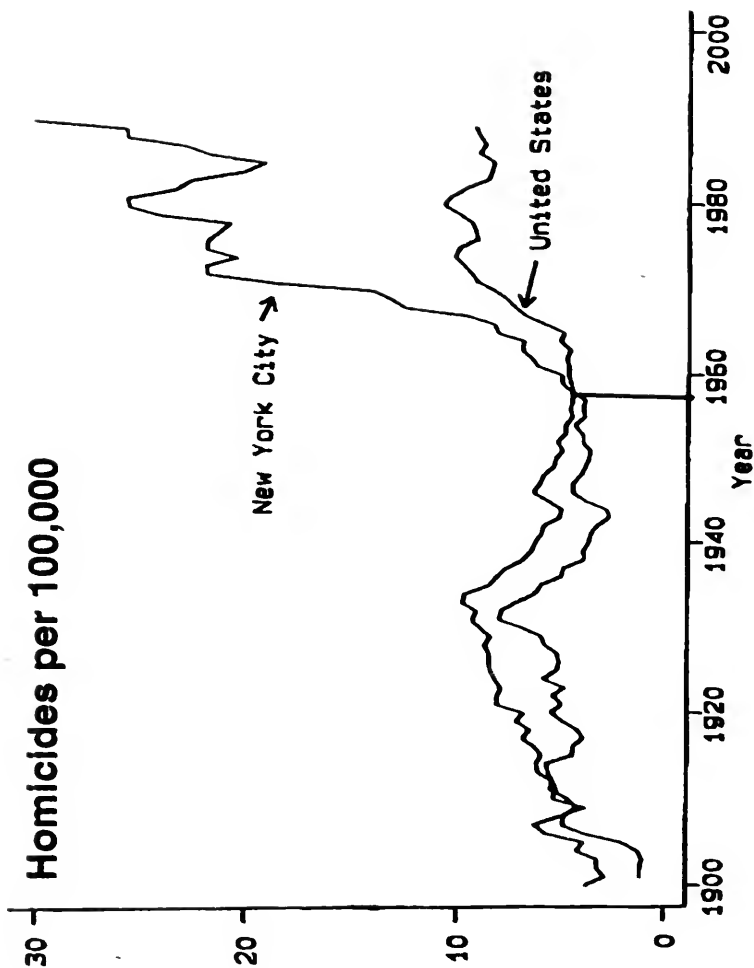
It is essential that we understand that by choosing prohibition we are choosing to have an intense crime problem concentrated among minorities. It is no different from Prohibition in the 1920s. Al Capone and Legs Diamond were recognizable urban slum types of that era. Much of the crime in our day is of the same order, down to formal executions. The St. Valentine's Day Massacre of 1929 has entered American folk memory. It was all but re-enacted in New York City in 1993. In the Morrisania section of the Bronx, six persons were made to lie down on a tenement floor. Five were shot in the back of the head. A young woman who turned her head was shot in the eye. But that was only six dead, not enough to meet the qualification, as it were, of the look-alike competition. However, the following day, a

seventh person, the wife of one of the suspected murderers, was herself murdered in the Bronx County Courthouse.

Clearly federal drug policy is responsible for a degree of social regression for which there does not appear to be any equivalent in our history. Fueled by drug arrests, prison populations hit a record of 883,593 at the end of 1992. Indeed, the number of inmates imprisoned for drug offenses now exceeds those in prison for property crimes. And, as the youth are said to say, we just don't get it. What we don't get is the admittedly complex proposition that the recurrent "failure" of our avowed drug policy represents the success of a strategy designed to avoid a different failure. Those most affected do not at present have a political vocabulary that can "demystify" this conundrum. And, to say once more, the medical profession is mostly mute.

One more once more. We must recognize that our choice of policy—legalization or prohibition—involves a choice of outcomes. An enormous public health problem on the one hand, an enormous crime problem on the other. The latter clearly requires more by way of public policy than the death penalty for people who kill each other in any event. Surely, drug policy should be a central concern for those who deal with issues involving race in our society. Interdiction and "drug busts" are probably necessary symbolic acts, but nothing more. Only the development of a blocking or neutralizing agent would have any real effect, given the setting in which our drug problem now occurs.

That setting—an independent variable, as Norman Zinberg insisted—is the near collapse of family structure in our central cities. Without this, drug abuse would present a real but, even so, manageable problem of behavior by marginal individuals. With it the problem is no longer manageable. To use an epidemiological analogy, we have a famine-weakened population attacked by a fierce new virus.



Source: Professor Eric Monkkonen
Department of History/UCLA



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D. C. 20530

APR - 5 1994

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

With regard to the nomination of Thomas Constantine to be Administrator of the Drug Enforcement Administration, enclosed are Mr. Constantine's responses to the written questions following his confirmation hearing.

Sincerely,

A handwritten signature in cursive script that reads "Sheila Anthony".

Sheila F. Anthony
Assistant Attorney General

Enclosures

SENATOR JOSEPH R. BIDEN, JR., CHAIRMAN
COMMITTEE ON THE JUDICIARY

QUESTIONS FOR SUPERINTENDENT THOMAS CONSTANTINE

The Administration's drug strategy calls for an important shift in the nation's drug interdiction effort -- away from a strategy of simply chasing the ever-changing routes and tactics of the drug traffickers in the so-called transit zone (the Caribbean), to one that focuses on an intelligence-driven interdiction effort and greater reliance on enforcement efforts in -- and by -- the source countries of the Andean region.

I have long questioned the efficacy of this effort. And now, with several years' experience, the case seems clear. From 1990 to 1992, we boosted our interdiction effort by about \$400 million, to about \$2 billion. Yet, cocaine supplies on the streets of America actually grew more plentiful. Since 1992, we have cut the interdiction budget back by about \$800 million, back to the funding level at the beginning of the nation's first drug strategy. In the face of the cuts to interdiction, the drug supplies to America's major drug traffickers did not increase (some factors indicate that cocaine grew a bit scarcer, though not significantly.)

1. Do you agree that drug interdiction has not proven a particularly fruitful exercise -- at least how we have conducted our operations thus far?

DEA is an enforcement not an interdiction agency. The U.S. Customs Service and the U.S. Coast Guard, with support from the Department of Defense, are the primary U.S. interdiction agencies.

DEA believes that unfocused and random interdiction is not cost effective. This was the conclusion of an exhaustive and comprehensive review of international drug trafficking conducted during the first eight months of this Administration. This review, which resulted in a new Presidential Directive, concluded that despite expensive interdiction efforts by our military and civilian forces, the availability of drugs has not been significantly reduced at home. This is why we are now emphasizing efforts at the source where the drug problem is concentrated and the chances of greatly disrupting trade are increased.

The U.S. Government is not terminating all interdiction efforts. A limited and focused interdiction effort, both along our borders and abroad, will be continued and we will remain flexible enough to quickly adapt to changing trafficker patterns. The key to this improved initiative will be better coordination between the military and law enforcement and greater use of intelligence to focus military and civilian detection and monitoring assets in support of law enforcement priorities and against high-value targets.

To accomplish this, aerial and maritime detection and monitoring assets will be redirected where validated intelligence has identified critical nodes or chokepoints and where the host nation has demonstrated a high resolve to fight narcotics trafficking. These assets will directly support law enforcement endgame activity, with priority to the source countries.

The second priority, looking outward from the U.S. southern border, will be to maintain an effective focused interdiction capability in the transit zone. This capability will be based upon actionable intelligence, but will remain flexible to respond to changing trafficking patterns.

As interdiction efforts, all our drug efforts must be evaluated, and those which have not proven successful must be refined.

2. Will you be willing to cut DEA programs that you do not believe have a proven track record?

I will be reviewing DEA policies and programs in the first few months as Administrator. Programs will be evaluated based on their merit, their proven success, and their promise and potential. It is important, particularly during this time of shrinking resources, that all programs show desired results. I will be looking to ensure that DEA's resources are being maximized to target the highest levels of the drug trade.

In order to make decisions on which programs work and which need to be changed, I will be calling upon the top field managers from DEA to provide me with the benefit of their views on the balance between domestic and international programs, how we can do more in violent crime enforcement, and where we should be concentrating our greatest efforts. I am also prepared to place more agents currently at headquarters back in the field.

3. FBI Director Freeh recently released his plan to shift 600 FBI agents from supervisory and administrative posts to the field offices, and America's streets. Will you be willing [to] undertake a similar review of the allocation of DEA special agents?

As the Administrator of DEA, I intend to continue to adhere to the same philosophy that I implemented as Superintendent of the New York State Police: that the field should be the last place to cut in lean budget times, and that Headquarters staff and functions must be reviewed and continuously evaluated. Lower priority programs and functions at Headquarters will be eliminated in order to maintain successful programs in the field. Those agents on the front lines will be my main concern, and every effort will be made to ensure that their enforcement capabilities are not hampered.

The number of DEA agents at Headquarters is small; there are 230 agents managing enforcement programs and performing policy functions. Even so, I will consider shifting agent resources from Headquarters to the field as we downsize our Headquarters operations.

I would like you to address an issue that has been covered extensively over the past few years to get your comments on this matter into the committee record. Let me point out that many have reviewed this matter, and your forthright actions underscore your long record of integrity and professionalism. I refer to the charges against six New York State troopers for tampering with fingerprint evidence in criminal cases.

4. When and how did you first become aware of this situation?
5. What specific actions did you take upon learning of these allegations -- and when did you take these actions?
6. I understand that you did not stop with investigating the actions of the troopers of troop C -- but that you also reviewed the entire New York State Police. Is that correct?
7. What actions did you take to make sure that such a problem could never again arise in the New York State Troopers?

Many of the nation's other leading police agencies had long-

standing procedures to prevent the possibility of such evidence tampering. The New York State troopers enjoys an overall excellent reputation for honesty and professionalism. But, with "20/20 hindsight,"

8. Would the tampering that occurred have been avoided through such controls, had they been in place in the New York State Police?

In June of 1992, the New York State Police was advised by the Albany Office of the FBI that a State Police employee, former Investigator David Harding, had admitted possible illegal activity when he applied for a position with the CIA in January of 1991. The delay in reporting this information to the State Police was attributable to clerical personnel not recognizing the serious implications of the admissions of the State Police employee. Prior to June of 1992, the New York State Police was unaware of this illegal activity.

The allegation was immediately assigned to the highest ranking members of the New York State Police Professional Standards Unit. After a short delay to acquire the appropriate security clearance, an Internal Affairs Inspector travelled to CIA Headquarters to interview the CIA personnel. After reviewing the file, the Professional Standards Unit believed that the employee had actually fabricated evidence in his role as an evidence technician. Originally, it was planned to put the employee under surveillance and simultaneously seize all of his case files. However, the New York State Police determined that he was soon scheduled to testify in a major crime trial in Broome County, New York. At this point, the State Police immediately advised the District Attorney that there might be serious problems with this employee and that he should not be utilized in any trials until an Internal Affairs investigation was completed. State Police Inspectors and the District Attorney then brought the employee in for questioning.

Although he admitted fabricating evidence in the one case discussed at the CIA interview, he denied any other wrongdoing. Due to this admission, and his evasive attitude, he was immediately suspended from duty. Because this person was an evidence technician and had been involved in evidence collection in a substantial number of cases, all of his records were seized.

In the internal evidence review, it appeared that there were a number of inconsistencies in the records. As a result, the State Police requested that FBI forensic experts be assigned to the investigation to give expert opinions of the evidence in question. It immediately became apparent that in a number of the investigations, the suspect employee had been assisted by additional evidence technicians. As a result, in July of 1992, the entire Professional Standards Unit, along with the most experienced State Police Criminal Investigators, were detailed to conduct a complete review of every investigation conducted by Troop C. This team, along with FBI forensic experts, reviewed thousands of cases. In those instances where there was any question regarding the validity of the evidence, the materials were sent to the FBI Laboratory for a final determination.

The investigation spanned several counties and, in the opinion of the State Police, required a special prosecutor with expanded jurisdiction. Mr. Nelson Roth, a private attorney in Ithaca, New York, with a background as a public defender and law school professor, had already been working on the Tompkins County aspect of the investigation. Mr. Roth is an outstanding lawyer with a sincere interest in determining the entire truth of the allegations and diligently working to bring those who violated

their oath to justice. As a result, along with the affected District Attorneys, I petitioned Governor Cuomo to appoint Mr. Roth as the Special Prosecutor for the entire investigation.

The end result has been that Mr. Roth, working with the New York State Police Internal Affairs Unit and the FBI, has brought indictments against a total of five former or suspended evidence personnel assigned to Troop C. Three of these subjects have pled guilty and are now serving time in State correctional facilities. One of the remaining individuals has been acquitted at trial and is awaiting retrial. The fifth individual has pled not guilty and is awaiting trial.

In November 1992, when the State Police Internal Affairs Unit uncovered the problem at Troop C, the State Police immediately put in place several programs to insure the integrity of the Statewide operation. The first phase was a detailed review of every piece of fingerprint evidence in the entire State to determine if there was any systemic problem. This review consisted of 7,000 pieces of evidence and determined that there was no systemic problem. The only other issue identified was in Troop F where it had been determined that an investigator had prepared a false document to an internal file regarding a fingerprint match. Although this documentation was never used in a criminal case, the subject investigator was suspended from duty, arrested, and has pled not guilty.

The second phase of the new evidence strategy was the development of a completely new evidence collection protocol and manual. The State Police contacted every major law enforcement agency in the United States to gather information on how other departments handled similar problems. The resultant policy is one of the most stringent in the nation, calling for coverification at each critical stage and enhanced supervisory controls. In addition, specialized training, with a strong emphasis on ethics and new inspection programs, has been implemented.

The New York State Police is one of the ten largest police agencies in the United States and for the past 77 years, has earned a reputation for integrity and professionalism. In fact, State Police personnel are often utilized by District Attorneys, special prosecutors, and government commissions to assist in corruption investigations. Although the illegal actions of the evidence technician were an aberration for the New York State Police, it nonetheless was embarrassing and required a complete review of our procedures.

The evidence protocol in place at the time of the events was similar to that in most police agencies. The fundamental problem was that a group of individuals violated their oath of office and betrayed the trust that was part of their office. In hindsight, the State Police, with a strong history of integrity, relied on the honesty of these employees. They were able to mask their wrongdoing by providing superfluous and redundant testimony after the arrest of a defendant. This is best explained by an example.

In the State Police procedures, evidence personnel are assigned to assist at major crime scenes to process the area for trace evidence. These individuals conduct such processing at the scene and bring the physical evidence to Troop Headquarters. At the same time, field investigators conduct the routine interviews, identify witnesses, and develop potential information regarding suspects. At such time as the field investigation develops sufficient independent evidence, such as confessions or eye-witnesses, the suspect is arrested. As part of the arrest process, the defendant is fingerprinted and photographed. The fingerprint records were then submitted to the Evidence Section

at Troop Headquarters where the corrupt technician then transposed the legally acquired fingerprints to evidence collected at a crime scene. In that this physical evidence seemed to corroborate information gained from a confession or an eyewitness, they were able to avoid detection. During the time they fabricated evidence in approximately 36 cases, their testimony was not questioned by prosecutors, judges, or defense attorneys. In fact, despite their illegal acts, the original non-fingerprint evidence was adequate enough to re-convict defendants who had retrials as a result of the incident.

There is no doubt that if the new protocol, with its emphasis on co-verification and intense supervision, had been in place, it would have been extremely difficult for these individuals to engage in such corrupt activity. There is also reason to believe that if the first line supervisor had been more diligent and responsible in insuring quality controls, that the problem might have been uncovered earlier. The State Police also believes that if the information from the CIA interview in January 1991 had been made available immediately, a large number of the illegal acts would have been prevented. However, as always, we must depend on human beings to be honest and to adhere to their oath of office. The individuals involved did not follow that standard of integrity and caused a great deal of embarrassment for the State Police.

Throughout the course of the investigation, the State Police has consulted with the FBI, Special Prosecutor, and independent authorities on police corruption to insure that the internal inquiry was being conducted professionally. Each of these individuals credited the New York State Police with recognizing the seriousness of the problem and diligently pursuing each and every allegation.

The DEA -- as all Federal investigative agencies -- must develop a coherent, strategic plan for identifying the most dangerous drug organizations. Such an evaluation can be based on any number of factors -- amount or type of drugs shipped, level of violence used, use of corruption, and many others. We need better information about how many drug trafficking organizations are active in the U.S., and what additional resources are required to break their hold.

Drug director Brown's recently released drug strategy points to the DEA's kingpin strategy as one mechanism for selecting key drug enforcement targets.

9. I do not want to go into any of the confidential details of this strategy, but are you familiar with this strategy? Do you support this kingpin strategy?

Yes, I am familiar with the Kingpin strategy which was established by DEA in 1991 as a means to identify the vulnerabilities of major drug organizations. It is one of a number of DEA's programs to reduce drug trafficking and violent crime in America. DEA is also committed to dismantling the trafficking networks operating within our borders. Those criminals have a direct impact upon the quality of life in our communities and are responsible for most of the violent crime in our nation.

DEA is designated as the lead drug law enforcement agency in the nation, and as such, has a major role to play in the identification and dismantling of drug trafficking organizations around the globe. For the past twenty years, DEA has contributed to the worldwide efforts to reduce drug trafficking and to separate traffickers from their ill-gotten gains. Currently, we have a presence in 50 countries and in all the major cities of the United States.

Most of the violent drug-related crimes which are committed in the United States have direct links back to the multinational drug organizations which operate around the world.

These are organizations capable of processing and transporting thousands of kilos of cocaine to the United States each year, corporations with discipline and secrecy, which launder billions of dollars to conceal the source of profits.

After studying the operations of cocaine groups for several years, DEA devised, in 1991, a strategy to target the vulnerabilities of these organizations. This approach systematically identifies and seeks to disrupt all aspects of their operations. We have targeted 12 drug organizations operating around the world -- eight cocaine and four heroin -- which are which are responsible for 80 percent of the cocaine and most of the heroin entering the United States. The main goal of this strategy is to exploit the traffickers' drug processing capabilities by reducing the flow of chemicals, disrupting their transportation and communications networks, and dismantling their financial infrastructure.

In over twenty years, DEA has been dealing with violent criminals who are involved in the drug trade, and has an important role to play in our nation's current efforts to reduce violence on the streets of America. As Administrator of DEA, I have assured the Attorney General that we will work side-by-side with our partners from State and local law enforcement to address this violence. DEA has joined INS and the U.S. Marshals Service in a commitment to work with the U.S. Attorneys in each Federal judicial district to develop and implement a comprehensive investigative strategy targeting violent crime. DEA is fully committed to this policy and I have asked all of our Special Agents in Charge to meet with their Federal, State, and local counterparts to assess the violent crime problem in their areas and to submit joint investigative plans by mid-April.

Our successful State and local task force program combines the jurisdictional expertise of our counterparts with the investigative expertise of Federal law enforcement. DEA operates 103 task forces which are composed of over 1,500 State and local officers.

Throughout the country, DEA is working with State and local enforcement agencies to eradicate marijuana and dismantle marijuana trafficking organizations, identify and eliminate heroin trafficking organizations in the United States, prevent the diversion of illicit drugs, arrest those trafficking in dangerous drugs, seize traffickers' assets, and help localities in High Intensity Drug Trafficking Areas address their specific drug trafficking problems.

In short, DEA is committed and able to positively impact on the quality of life in the United States by facing the tough challenge of dismantling drug networks both domestic and international which are the source of the drugs and violence which have eroded our communities.

10. Are there other steps we can take to enhance our strategic planning capabilities?

DEA has a comprehensive Strategic Management System (SMS) already in place. The SMS is the agency's principal planning document and articulates and prioritizes policies that support agency goals including guidance for efficiently and effectively applying available resources. The system is updated and thor-

oroughly reviewed and revised annually. Experts from the various disciplines within and as necessary, outside the Agency come together to assess the worldwide drug threat in drug-specific terms. During this process, current and anticipated socio-political, economic, and technical changes impacting on drug trafficking and the Federal response to them are addressed. Predictions concerning the roles of specific trafficking organizations, new and/or emerging groups, drug availability and drug abuse trends/patterns are also made based on all available intelligence resources. In accordance with the policies and goals set forth in the National Drug Control Strategy, and the annual assessments, DEA develops its strategies and program directives to combat worldwide drug trafficking.

As a result of Administration concerns that violent crime was not being addressed with the proper strategic focus, the Department of Justice has tasked U.S. Attorneys in the 94 judicial districts to develop individual strategies for coping with violent crime. DEA is participating in this strategy development process, along with other Federal agencies.

Additionally, beginning last Spring, the Federal Government conducted a comprehensive review of its ability to effectively counter the international drug trafficking problem. This inter-agency effort resulted in the President's Decision Directive 14 and the classified International Drug Control Strategy. DEA's interagency-coordinated regional planning process is an effort to enhance our strategic capabilities and improve the law enforcement proficiency of foreign nations in support of the International Strategy. Efforts concentrate on traditional and creative investigations against major traffickers and their supporting organizations. These enforcement operations require a system of well-coordinated international and domestic investigations that combine elements of all operational and intelligence resources of the United States and foreign governments where appropriate.

Unfortunately, in the past there has been -- in my view -- a preoccupation with the number of arrests and seizures -- and not necessarily investigations and arrests of the most dangerous drug traffickers.

11. What ways will you seek to assure that agents' -- and agencies -- performance is evaluated to reflect the key strategic decisions made by DEA?

DEA has already begun to emphasize measurements of success other than arrest and seizure statistics, including cooperation with other Federal law enforcement agencies, State and local organizations, and the ability to have a positive impact on safety and the quality of life in communities around the country.

Agents and DEA offices are now being educated to stress enforcement actions which have a more lasting and permanent effect on today's drug trafficking organizations. Agents are given proper credit for placing emphasis on utilizing a systems approach to organizational targeting in their investigations. Factors such as the level of trafficker targeted, the extent of the organization being investigated, and the level of disruption to the organization's operations are key indicators that the agent/office is implementing present policy and strategy.

Use of wiretap investigations, where possible/appropriate, permit law enforcement to "get inside" the organizations; the readiness of an agent to use such techniques is part of the evaluation process. The level of demonstrated cooperation (by the individual agent and offices) with other offices in other

geographic regions is another tool used to measure the success of the investigation and the agents' skills; only through such cooperation and coordinated enforcement activity can these national and international organizations be dismantled.

Another manner in which agents' and offices' effectiveness is measured is by actually observing and analyzing changes in operating procedures by the trafficking organizations, and not limiting assessments to statistical data such as arrests and seizures. If the traffickers are forced to change their mode of operations, law enforcement techniques have been effective; continued pressure which results in continuing alterations in trafficker procedures will be emphasized in evaluations.

While these will be the principal measurements of effectiveness, there will always be some statistical evaluation involved because it is easily quantifiable. However, even in the areas of arrest and seizure statistics, the emphasis will be re-focused to reflect the present strategy and policy of DEA to dismantle major organizations and cripple their operations through seizures.

Rather than looking at the total number of arrests, the level of trafficker arrested will become far more important. We are targeting major organizations which operate domestically and internationally. We have already observed that the level of trafficker taken into custody is now higher because of effective utilization of wiretaps and other organizational targeting tools. Instead of simply arresting the individual living in the "stash" house (a salaried employee, easily replaced) we are concentrating on identifying and arresting the cell heads, cell directors, and regional managers. These are the leadership figures and organizational lieutenants who are in direct contact with organization leaders themselves. These individuals (the cell heads, cell directors, and regional managers) provide the operational leadership and focus for drug trafficking organizations; by removing them, these organizations are seriously hurt, sometimes put out of business permanently.

We are also stressing the importance of initiatives which have a direct, long-term and positive impact upon community safety, such as recent DEA cooperative Task Force enforcement actions in Schenectady, New York; Fort Lauderdale, Florida; and New Haven, Connecticut. Drug trafficking organizations which caused disruption and violence were dismantled, and communities were able to function as before. When crack dealers were targeted by a task force composed of Federal, State, and local law enforcement in Schenectady, violent crime fell by 37 percent; in Fort Lauderdale, 911 calls for neighborhoods fell by 95 percent. In New Haven, the murder rate fell by almost 50 percent when the task force took action against drug gangs.

The seizure of drugs in large quantities - as opposed to the one, five, and even twenty kilogram quantities - is evidence that the trafficking organizations' operations have been disrupted at an earlier stage, preventing dispersion of the drugs which would complicate enforcement actions. This is an especially relevant measurement of effectiveness for our offices overseas and the agents assigned there. For example, an 8 ton seizure of cocaine in the source countries or transit zones (Central America/Mexico) is particularly significant. Should that 8 tons be allowed to reach stash houses inside the United States, it will be broken up into shipments of 2, 5, 10, 20, or 50 kilogram quantities. If this occurs, it might take as many as 400-500 enforcement actions (depending upon the size of the shipment and seizure) in multiple jurisdictions across the U.S. to replace the one enforcement action carried out overseas in conjunction with our colleagues in other nations.

In sum, DEA has already begun educating its offices/agents on the need to target the highest level of trafficker and the organizations themselves, both domestically and overseas. Personal and unit evaluations will take these factors into account, and those individuals/offices which best implement the strategy and policy will receive the highest ratings.

**SENATOR PATRICK J. LEAHY
COMMITTEE ON THE JUDICIARY**

QUESTIONS FOR SUPERINTENDENT THOMAS CONSTANTINE

RURAL CRIME

1. From your experience in the New York State Police, I am sure you are familiar with the crime problems faced by medium- and small-sized towns in places like up-state New York and Vermont. In your view, what is the number one crime problem these communities face that should be addressed with the assistance of the Federal Government?

As I mentioned during my confirmation hearing, my experience in the New York State Police has given me a first-hand look at how small cities and rural areas are affected by drugs and violence, which, in my opinion, is the number one crime problem faced by these communities. Under ideal budget circumstances, DEA would be able to staff offices in rural areas, such as upstate New York and Vermont, and maintain a large presence in the major metropolitan areas of the nation. Unfortunately, it is not possible with current budget realities to have large DEA resources in all the rural areas we would like to.

The Federal Government must do more to help smaller States and rural areas confront the violent crime problem which have become a fact of life in the 1990's. DEA believes that Federal presence in these areas is necessary, and through our State and local task force programs, established in 1970 in New York City, we are able to have an impact in a number of areas. We currently have 103 State and local task forces in which 1500 State and local law enforcement offices participate in narcotics enforcement. These task forces combine Federal expertise with local know-how and they have a multiplier effect in enforcement. In New York, DEA has task forces in Rochester, Albany, Syracuse, Buffalo, Long Island, Westchester County, and Newburgh. There is also a task force in Burlington, Vermont.

The Department of Justice has a number of other Federal programs which assist smaller States and rural areas, further enhancing the ability of States and rural areas to fight crime.

2. How serious is the threat of urban drug gangs seeking such towns in rural areas as new markets for illegal narcotics?

I think the threat of urban gangs seeking new markets in rural areas is very real. Rural crime is rising at a faster rate than urban crime. As drug markets in the inner cities are saturated, some of these markets have moved to rural areas and have taken hold. Major drug trafficking organizations are operating in many rural areas; in fact, in the small town of Minden, New York, 50 miles from Albany, an international drug trafficking operation moved into an abandoned farmhouse and set up a lab operation capable of making 18,000 kilograms of cocaine a month. Two-hundred-thirty-five 55 gallon drums of either were seized at the lab site and over 20 individuals were

subsequently arrested. This investigation also led DEA investigators to cocaine laboratories in Greensboro, North Carolina, and Culpepp, Virginia. At the time, based on the volume of chemicals, the Minden Laboratory was the largest ever seized in the United States and the second largest in the world.

3. From your experience, what is the potential for the rural drug taskforces created in the crime bill for attacking drug trafficking in rural areas?

Medium and small cities in New York and throughout the United States are suffering from the proliferation of drug trafficking. Many people thought that these smaller communities would not experience the scourge of drug use and trafficking. DEA is aware that no area is immune from the impact of drug trafficking and traditionally has offered its resources and assistance in the form of training and investigative assistance to the enforcement authorities in the smaller cities and rural counties. DEA has strived to maintain at least one office in each State because we feel that it is important to work closely with local authorities to address State and local drug problems.

The foundation of DEA's cooperation with State and local authorities for the past 23 years has been our State and Local Task Force Program. In 1993, 588 Special Agents, more than 14 percent of DEA's total agent strength, were assigned to this program; 1500 State and local officers were assigned from their departments. Almost half of all investigative work hours were spent on the highest level of violators. Operating in 103 cities throughout the country, these task forces have melded the talents, financial, and equipment resources of the DEA and local agencies and produced effective drug law enforcement with a minimum of costs and overhead. With additional resources this program could be expanded to many of our smaller cities and rural counties with the same results. While we realize that the rural drug task force provision in the Crime Bill is intended to help alleviate the drug problem in rural areas, we believe that establishing a new multi-agency task force system in rural areas could create unnecessary bureaucracy. We believe that DEA's current task force program works well in rural areas, and with some enhancements, more progress against drug trafficking in rural areas could be made.

DRUG TRAFFICKING OVER THE NORTHERN BORDER

4. Based on your experience in upstate New York, how serious is the problem of drug trafficking across the Northern border?

Canada is a final destination for cocaine from Latin America as well as a transit location for cocaine being sent to the United States. There are documented cases of cocaine being shipped from Canada into the Detroit area and also into New York City. Trafficking organizations make use of both internal waterways and commercial traffic between the two countries to effect those shipments. There are high-level international traffickers who take advantage of these populations to mask their illicit trafficking and money-laundering operations. The potential for staging cocaine in isolated areas in Canada close to the U.S. border for shipment into the United States is a concern for both U.S. and Canadian authorities. At present, however, only a very small percentage of the drugs illicitly entering the United States comes via Canada. The Southeast and Southwest borders remain the primary entry locations for cocaine and marijuana smuggled into the United States.

DRUG INTELLIGENCE

5. In your hearing, you mentioned a drug interdiction and intelligence program called Project Northstar in which the Department of Defense participated.

Under what circumstances can the Department of Defense or other Government agencies gain access to intelligence gathered by the 19 Federal drug intelligence centers now in existence?

Based on my experience as Superintendent of the New York State Police, Operation Northstar, a DoD interdiction program, had limited application.

The 19 intelligence centers identified in the US General Accounting Office (GAO) Report entitled Drug Control - Coordination of Intelligence Activities dated April 1993, include agencies within the Department of Justice (DOJ), Department of Transportation (DOT), Department of Defense (DoD), Central Intelligence Agency (CIA) and joint interdiction coordination centers. Six of the intelligence centers referred to in the GAO report are operated by the Department of Defense and one is operated by the CIA. DEA maintains two of the intelligence centers referred to in the report; e.g., the Intelligence Division at DEA Headquarters and the El Paso Intelligence Center (EPIC). The majority of the other intelligence centers are operated by the US Coast Guard and the US Customs Service in support of their interdiction activities. Each of these centers has developed their unique mechanisms to facilitate access to and the sharing of drug-related information.

The following summarizes DoD uses to access intelligence gathered by various drug intelligence centers:

1. The DEA and other Federal agencies have exchanged liaison officers at the headquarters level to improve coordination and information sharing. Examples include DEA agents assigned to CIA, DoD, JTF-4, 5, and 6, U.S. Southern Command, El Paso Intelligence Center, National Drug Intelligence Center, FinCEN, State Department, FBI and INTERPOL. Representatives of the IC/DoD communities provide liaison support to DEA Headquarters as well. Working-level exchanges of personnel from the IC/DoD community to provide ad hoc support for specific operations have also served as a valuable mechanism to share information.
2. EPIC is a clearinghouse for tactical intelligence and the collection, processing, analysis, and dissemination of information related to worldwide drug movement, alien smuggling and weapons smuggling. Thirteen Federal law enforcement agencies participate, with support from the DoD and the Intelligence Community. Additionally, there are agreements with all 50 States to support intelligence sharing programs. Representatives from DoD, to include USCINCLANT, JTF-4, 5, and 6, FORSCOM, NORAD, and DIA, recently completed a 90-day feasibility study of the establishment of a DoD cell at EPIC which drew enthusiastic reviews from both law enforcement and the intelligence components of the military services. As a result of the study, a permanent DoD cell at EPIC was recommended.

6. How is this access obtained? Are agencies linked by computer lines or in some other automated fashion? Which agencies?

Access to DEA data is available via a number of automated information systems. M204, DEA's primary automated system provides worldwide connectivity with all DEA offices. In addition, selected personnel from other agencies involved in drug law enforcement are granted access to DEA's main database via the NADDIS-X system, i.e., FBI and Customs. As indicated earlier, FBI and DEA are developing a joint index system which will allow automated sharing of drug related investigative information.

Worldwide DEA reporting is disseminated to the counter-drug community via cable. Additionally, DEA disseminates information via DoD's CN-CMS, ADNET, DSNET, NTRS, and other information systems. DEA information related to Customs' interdiction mission is available via the TECS system. Limited DEA information can also be obtained by authorized Federal, State, and local law enforcement and DoD personnel via telephone from EPIC. Generally, Government agencies with a counter-drug mission receive relevant data on a continuing basis.

7. What controls, if any, exist on particular agencies use of this information?

The primary control over use of law enforcement investigative information is that DEA does not disseminate information concerning ongoing criminal investigations to any other agency except on a legitimate need to know basis. In addition, there are legal constraints on the dissemination of law enforcement investigative information, e.g., Grand Jury information which DEA must follow.

Beyond constraints on DEA dissemination, DoD Directive 5240.1-R entitled "Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons" provides additional controls. DoD is authorized to collect information concerning US persons or organizations if that person(s) is believed to be engaged in international terrorist or international narcotics activities. Further, DoD is authorized to disseminate this information if the information is requisite for the performance of a lawful Government function; or if the dissemination is undertaken pursuant to an agreement or other understanding with a foreign government. Any other dissemination must be approved by the legal office responsible for advising the DoD component concerned after consultation with the Department of Justice and General Counsel of the Department of Defense. This approval is subject to compliance with all applicable laws, executive orders and regulations.

Finally, Executive Order 12333 in conjunction with provisions set forth by the Attorney General establishes procedures which clearly define the methods in which intelligence components are permitted to collect, retain and disseminate information pertaining to narcotics activities.

COUNTERFEITING AND MONEY LAUNDERING

8. An idea of exchanging \$100 bills with noncounterfeitable bills has been circulating in some law enforcement and anti-terrorism circles. The idea is to exchange, over a one-year period, all existing \$100 bills with a new \$100 currency that is less easily counterfeitable. According to proponents, this would further at least three goals:

- (1) Terrorist organizations that counterfeit U.S. currency would not have a ready source of homemade currency to buy arms and conduct terrorist activities;
- (2) International drug cartels that need to launder \$50 to \$200 billion annually will not have time to launder all the current \$100 bills they possess before the exchange period ends making some of their money worthless (or their costs of laundering will increase);
- (3) Because every dollar bill is in effect a certificate of indebtedness to the United States, any \$100 dollar bills that drug traffickers cannot exchange immediately become a credit to the United States Treasury. These sums could be used for deficit reduction or other purposes.

What is the DEA's view of the merits of this proposal?

DEA is extremely interested in any legislation that restricts the flow of U.S. currency, particularly \$100 bills, into foreign countries. The only business activity in the United States that engages in the export of U.S. currency is drug trafficking. DEA would support any proposal, to include the required exchange of all \$100 bills, that would jeopardize the U.S. currency holdings of drug traffickers and, at the same time, not impede legitimate commerce.

In 1990, DEA proposed that the Treasury Department consider the establishment of a separate domestic and foreign U.S. paper currency in order to effectively stop the export of U.S. dollars derived through drug sales. The Treasury Department law enforcement agencies supported this proposal; however, the banking community expressed concern that this proposal would be too costly to implement.

NOMINATIONS OF CAMERON CURRIE, FRANKLIN D. BURGESS, MICHAEL DAVIS, ANCER HAGGERTY, AND DANIEL T.K. HURLEY, TO BE U.S. DISTRICT JUDGES

THURSDAY, MARCH 3, 1994

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:02 p.m., in Room SD-226, Dirksen Senate Office Building, Hon. Dianne Feinstein presiding.

Also present: Senator Thurmond.

OPENING STATEMENT OF SENATOR FEINSTEIN

Senator FEINSTEIN. This hearing will come to order.

This afternoon the Judiciary Committee will conduct a hearing on the following judicial nominees: Judge Franklin Burgess to be district court judge for the Western District of Washington; Judge Michael Davis to be district court judge for the District of Minnesota; and Judge Ancer Haggerty to be district court judge for the District of Oregon; Judge Daniel Hurley to be district court judge for the Southern District of Florida; and Cameron Currie to be district court judge for the District of South Carolina.

As is customary, we will hear first from Senators and Representatives who wish to introduce nominees to the committee. But before we turn to them, let me state for the record that each nominee has completed a detailed questionnaire of his or her qualifications, experiences, finances, and philosophy. The portions of the questionnaire available to the public will be printed in the record of this hearing. We will also keep the record open for a limited time just in case members of the committee would like to submit written questions.

We have received a letter from Roy Thompson concerning the nomination of Judge Haggerty and a letter from some Minnesota Representatives concerning Judge Davis. Those letters will be placed in the record.

[See letters under Submissions for the Record.]

Senator FEINSTEIN. Of course, we will place in the record the full introductory statements of home-State Senators.

If I may now, may I ask Senator Thurmond, do you have a comment to make at this time?

Senator THURMOND. Yes, ma'am. I have a strong endorsement. Madam Chairman, I would be glad to go first as the senior Sen-

ator; however, Senator Hollings primarily recommended this lady, and maybe he ought to go first.

Senator FEINSTEIN. I did not quite know this was going to happen, but, Senator Hollings and the nominee, if you would please come forward.

As you know, this is a bifurcated process, and, ladies and gentlemen, what we do is have either the Senators or the Representatives who are presenting a nominee come forward with the nominee. We will run through all of the elected representatives and their nominees, and then we will hear individually, after that, as the second part of the process, from each one of the nominees. At that time the nominees will be subject to questions.

So at this time we will simply hear from the Senators involved, and it is my pleasure to recognize my colleague on the committee, Senator Thurmond.

Senator THURMOND. Do you want to go first?

Senator HOLLINGS. I will if you want me to.

STATEMENT OF HON. ERNEST F. HOLLINGS, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator HOLLINGS. I appreciate Senator Thurmond yielding. I waited 14 years just about to recommend someone for a judgeship.

Senator FEINSTEIN. Senator Hollings, by all means, I want to acknowledge you and thank you for being here.

Senator HOLLINGS. After 14 years, I think it is pretty nice. My senior Senator is always the master of courtesy, and I am grateful to him, and I am sure the nominee is grateful to him also for his long support.

Madam Chairman, right to the point. There are a lot in this room—and I can save time—that think they are responsible for this appointment. Jeanne McGowan, and Sean Kotell thinks he is responsible for it; Dorothy Seder; Rob Stewart there.

Senator THURMOND. If you want to introduce them, let them stand up.

Senator HOLLINGS. Well, that is all right. We will have the whole crowd stand up. But I wanted everybody to know that Cameron Currie is responsible for her own appointment, and I say that in the light of being advised in this regard and this responsibility by none other than John Sirica. Judge John Sirica years back, he was writing his book, and I was driving him around down in South Carolina, and he says, "Fritz, don't ever appoint anyone who has not been in the pits." He says, "They have a lot of smart lawyers around, but unless they have had the experience of actually being in the trial work, of being in the court, in the pits, they will never understand. I had flunked the bar exam and no law firm was looking for me, but after getting out, I just hung around the magistrate's office, got all that trial experience. Hogan and Hartson picked me up, and that is why I could see when those first witnesses came in during Watergate exactly what the game plan was, and that is how we broke that case."

In that regard, let me say that I was looking some 14 years ago. We had what you call the Judicial Advisory Council's Merit Commissions under President Carter. And I had appointed the first black district judge in the South as a judge in the U.S. District of

South Carolina. I was looking for a woman. And I asked those on that Merit Commission, I asked judges and friends all around. I asked trial lawyers. They were unanimous and all saying, well, the one you have got, you know, has been on as assistant U.S. attorney, Cam Currie. She is one that immediately comes to mind.

Of course, the administrations change and everything else, but now today, as I will outline in this quick record here because our other colleagues are waiting, she is not only the most qualified woman, she is the most qualified individual, period, man or woman in the State of South Carolina, from legal experience. And she comes in her own right.

Graduating from the University of South Carolina, having moved up here to Washington, she graduated from George Washington University National Law Center, and in 1975 she got out into a private firm, Arent and Fox, which we are all familiar with, as a trial lawyer. But as a trial lawyer there, she was sort of what we call second chair. She was not really in charge of that case. So in 1978, she had an opportunity to become an assistant U.S. attorney here in Washington, D.C., under Earl Silbert. He was the prosecuting attorney on the first Watergate cases, and she got a first chair position there under Earl Silbert as an assistant U.S. attorney.

In 1980, moving back to South Carolina, we were glad to have her appointed as an assistant U.S. attorney there, and she was in charge of the civil division, the first woman U.S. attorney appointed in our State. In 1983, she was appointed as the head of that Organized Crime and Drug Enforcement Task Force, OCDETF, bringing the famous jackpot cases. They were bringing all kinds of boatloads of drugs into the coastal area of South Carolina. You had to extradite witnesses all the way from Australia and everything else. It was a year long, several years long kind of trial and effort. It was totally successful, and with that in mind, I can tell you the judges themselves—and in due deference to my senior colleague—the majority of them were Republican judges. They chose her as the first woman U.S. magistrate in the history of South Carolina.

Thereafter, in 1986, she quit the practice of law, both civil and criminal, both State and Federal, and in 1989 she was appointed as the first woman Chief Deputy Attorney General of the United States, and right up to date, last week, Attorney General Reno had a high level conference over in Maryland of all the Federal efforts with respect to an organized task force on violent crime. That spawned 4 years ago under Cam Currie, the nominee. She got the statewide drug task force, later extended to white-collar crime, had a wonderful record, a 94 percent conviction record. They call her the "Black Widow," the defendants, but now the prosecutors and the lawyers all have respect for her abilities.

I will just quit right there, just saying that we are delighted to have her mother and father here, John and Virginia McGowan. John is an experienced lawyer in his own right from Florence. Her grandfather was before him. And we have the three children—the twins, Cameron and William, and the older brother, Rutledge—present with us.

Let me yield now and thank the distinguished senior Senator. Senator FEINSTEIN. Thank you, Senator Hollings.

Senator Thurmond.

**STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR
FROM THE STATE OF SOUTH CAROLINA**

Senator THURMOND. Madam Chairman, first I want to express my appreciation to the chairman of this Committee, Senator Biden, for putting this lady on this week. I urged him to do that because we need her in action as soon as we can get her down there.

Now, I will probably duplicate some of what Senator Hollings said, but I want to do it chronologically. She was born in 1940 in Florence, that year I was serving as a State Circuit Judge.

Senator FEINSTEIN. That is a good omen right then and there.

Senator THURMOND. She fared better than I did.

She received her B.A. degree in political science from the University of South Carolina in 1970. She taught government economics at Moultrie High School from 1970 to 1972; in 1975, a honors graduate of George Washington University Law School; served as assistant U.S. attorney here in Washington 1978 to 1980; assistant U.S. attorney in South Carolina 1980 to 1984; 1984 to 1986 a U.S. magistrate for the District of South Carolina; in private practice, an adjunct professor at USC Law School from 1986 to 1989.

She is currently chief deputy attorney general and director of the State Grand Jury Division in the South Carolina attorney general's office. She is a lady of integrity, a lady of ability, and a lady of dedication.

In my opinion, the President has made a wise choice in selecting this fine lady, and I heartily endorse her. I think she will make an excellent judge.

I am glad to be here with her at this time and stand by her and join Senator Hollings, and we hope that the Committee will act quickly and get her on the bench as soon as possible.

Senator FEINSTEIN. Thank you, Senator Thurmond. Thank you, Senator Hollings. Thank you, Ms. Currie. We will excuse you.

Senator FEINSTEIN. We will move on now to Judge Burgess, who will be introduced by Senator Murray and Senator Gorton. I believe Senator Murray needs to leave immediately, and I do not see Senator Gorton. So, Senator Murray, welcome. If you would proceed, I would appreciate it. Thank you.

**STATEMENT OF HON. PATTY MURRAY, A U.S. SENATOR FROM
THE STATE OF WASHINGTON**

Senator MURRAY. Thank you, Madam Chairman. I am delighted to be here today and very honored to introduce Franklin D. Burgess for the position of Federal Court judge in the Western District of my home State of Washington.

Judge Burgess has served as a U.S. Magistrate Judge for the Western District of Washington since 1981. Prior to his appointment to that position, he was Regional Counsel for the Federal Department of Housing and Urban Development and a partner in the law firm of McGavick, Burgess, Heller and Foiste.

Judge Burgess also has served in the City Attorney's office in Tacoma. He is a graduate of both the college and the school of law at Gonzaga University in Spokane, Washington.

I have been particularly impressed with Judge Burgess' civic involvement over the years. He has served as a member of the Board of Regents at Gonzaga University and the Tacoma Civil Service Board. He has volunteered with the Legal Aid Society, is a former local president of the NAACP, and has been a member of the Tacoma Boys Club and Big Brothers.

Madam Chair, it is my pleasure to introduce a candidate with a demonstrated commitment to public service, and to ensuring that the legal system is accessible to all members of the national community. I am delighted to be here with him today, and I urge the committee to move his nomination expediently.

Thank you.

Senator FEINSTEIN. Thank you very much, Senator Murray, and thank you, sir. We will hear from you shortly.

Senator FEINSTEIN. Now may I ask Michael Davis to come forward, please, and I see Senator Wellstone, who is present. Senator, welcome to the Judiciary Committee, and we are anxious to hear from you.

STATEMENT OF HON. PAUL WELLSTONE, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator WELLSTONE. Thank you, Madam Chair. Before I start, let me just for the record apologize for Senator Durenberger. He was kind enough to come by and talk with Michael and me and wish Michael his very best, but he had to leave. A very close friend of his, John Riley, who is well known in Minnesota, is struggling with a malignant brain tumor and is quite ill.

Senator FEINSTEIN. I am sorry to hear that. I did see him present earlier.

Senator WELLSTONE. Senator Durenberger did have to leave.

Let me introduce to you Michael Davis, Madam Chair, and he is here. I think Michael will have a chance also to introduce his family: his wife, Sara Wahl, whose mother, as it turns out, is a fine State Supreme Court Justice; sons Mike and Alex; mother, Doris Davis; and brother and sister-in-law, Chet and Rebecca Davis.

Judge Davis has served as a district court judge in the State of Minnesota for 10 years. Prior to becoming a judge, he had a distinguished career with the Neighborhood Justice Center in St. Paul and the Legal Rights Center and the Public Defender's Office in Minneapolis.

He has proven to be a judge of keen intelligence, inexhaustible energy, with excellent people skills, integrity, and, most important of all, moral courage. Among many other distinctions, he is credited with leading the reorganization of the judicial scheduling system to reduce the criminal case backlog, leading the Minnesota Supreme Court Racial Bias Task Force, and founding the Minnesota Minority Lawyers Association.

His candidacy, Madam Chair, was urged by the widest possible cross-section of the bar, including the dean of the University of Minnesota Law School, the chief justice and a former chief justice of our Minnesota Supreme Court, the heads of the county and State public defender organizations, as well as the Hennepin County attorney.

I believe, Madam Chair, that Judge Michael Davis is destined to become a judge—Hennepin District County Judge Michael Davis is destined to become a judge in the Federal District Court of great note and distinction. He will be, Madam Chair, your judge's judge. He will be a great judge in the Federal District Court. And as I think about this decision that I had to make—and I say this to you as a fellow colleague—I do not think we make any more important decisions as Senators than our recommendations to the President as to who he should nominate to serve in the judicial branch. I think this is one of the best decisions I ever made in my life.

Senator FEINSTEIN. Thank you very much. We thank the Senator from Minnesota. You certainly spoke in superlatives, and we look forward to talking with you, Judge Davis, a little later. Thank you very much.

Senator FEINSTEIN. May I next ask the senior Senator from the State of Oregon, Senator Hatfield, to come forward with Mr. Ancer Haggerty. And it is my understanding that Representative Wyden may be present.

Senator HATFIELD. Madam Chairman, before I have the privilege of introducing our nominee, I would like to have his wife and two daughters and son stand and be recognized as part of the backup team.

Senator FEINSTEIN. Excellent, and welcome. Thank you for being present.

Senator, please proceed.

STATEMENT OF HON. MARK O. HATFIELD, A U.S. SENATOR FROM THE STATE OF OREGON

Senator HATFIELD. Madam Chair, I would like to summarize a very distinguished record of a very distinguished gentleman. You have his biographical background and sketch, and I will not go into the detail of that, but I would only like to say that we are proud to be here today in the company of my colleague, Congressman Wyden, to introduce Judge Ancer Lee Haggerty.

We are also proud to say that he is a native-born Oregonian and went to the University of Oregon, played football and distinguished himself. He then went to your State, to the city of which you were mayor, to graduate from the Hastings College of Law. That makes it very special that you are presiding today.

When he finished law school, he came back to Portland where he took on the public defender role and defended many defendants who were indigent and learned about criminal law practice. From there he went to a very, very prestigious law firm, and became a partner with Schwabe, Williamson & Wyatt.

But, during the time that he was practicing law in this particular firm, he engaged in pro bono legal work for the Multnomah County Bar Association. He never lost that relationship to the needs of the poor, indigent, and others within that community.

I am also happy to say that he distinguished himself in many other forms. He was a lieutenant in the Marine Corps in the Vietnam War, and he distinguished himself with a Silver Star and the Purple Heart among other medals during the war service in Vietnam.

Let me move ahead and say, Madam Chair, that this is a very, very important nomination that we offer because we started processing a candidate to replace senior status Owen Panner in 1991, and the process that we have used since I have been in the Senate is a bipartisan kind of recommendation coming out of a committee of distinguished bar leaders. We have used ad hoc groups, and starting with President Carter, set up a regional sifting, screening committee. And we have made no reference to either political party as far as any former or present affiliation is concerned. So that, in a sense, this candidate today that we are presenting to you has moved through two administrations, and has been on the short list of possible nominees each time.

We are very anxious to get Judge Haggerty there on the job because, as I say, Judge Panner has taken senior status. These are going to be big shoes to fill. Judge Panner has been noted nationally as one of our leading district court judges. But I am persuaded that Ancer Lee Haggerty is fully qualified to fill those shoes.

A very good mutual friend of ours, former Governor Neil Goldschmidt, later as Secretary of Transportation under President Carter, appointed him to the district court of the State of Oregon, and later appointed Judge Haggerty to the circuit court of the State of Oregon. So he has this wonderful background and experience in judicial work, and I just have great pleasure in presenting him to you today and urge his consideration and his approval by this committee.

Senator FEINSTEIN. Thank you very much, Senator Hatfield.

Representative Wyden, we welcome you to the other House. Please proceed.

STATEMENT OF HON. RON WYDEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Mr. WYDEN. Thank you very much, Madam Chair, and I want to express my appreciation to the committee for the opportunity to come. I also want to thank our senior Senator who really honors me with the opportunity to participate with him this afternoon.

Let me be very brief, Madam Chair, and pick up on something that Senator Hatfield has said. We have operated in a truly bipartisan fashion with this appointment. Governor Barbara Roberts and I have worked very closely with Senator Hatfield—in fact, we have worked very closely with our entire congressional delegation—in selecting Ancer Haggerty. I am of the view that Judge Haggerty has demonstrated the intelligence, temperament, and integrity to be a truly outstanding Federal judge.

The one point I wanted to add to Senator Hatfield's excellent presentation is that Judge Haggerty has won enormous respect for one case that many of our citizens across this country followed very closely, and that was the civil trial of white supremacist Tom Metzger, which took place in Oregon in October of 1990. We are of the view that Justice Haggerty demonstrated great savvy in dealing with a very, very difficult case. It was a case that generated a great deal of controversy. It was followed very closely nationally, and in that case alone, not to say anything of the many other contributions made by Justice Haggerty, he has shown that he can

handle very, very difficult legal situations with great fairness and great efficiency.

It is a pleasure to be here with Senator Hatfield to urge that the committee act favorably on Justice Haggerty.

Senator FEINSTEIN. Thank you very much. Thank you very much, Representative. Thank you, Senator Hatfield. Judge, we will see you shortly.

Now may I ask that Daniel Hurley come forward please, and I believe Senator Graham and Representative Johnston would like to introduce him.

Senator Graham, welcome to the committee of which you are a distinguished member. It is good to see you at the witness table. We will ask to hear from you first.

STATEMENT OF HON. BOB GRAHAM, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator GRAHAM. Thank you very much, Madam Chairperson, Senator Thurmond. It is a distinct honor today to introduce to the committee Judge Daniel T.K. Hurley as a nominee for the U.S. District Court for the Southern District of Florida.

Madam Chairperson, I have a statement which I would ask to be included in the record in full, but in deference to your very demanding schedule, I would like to summarize Judge Hurley's distinguished career.

Senator FEINSTEIN. Without objection.

Senator GRAHAM. I might say that my colleague, Senator Connie Mack, would have liked to have been here today but had an unavoidable conflict. He has asked me to convey his support to the committee for Judge Hurley.

Senator FEINSTEIN. Thank you. That is noted.

Senator GRAHAM. Over the years, I have had the opportunity to follow Judge Hurley's career. I have met him on a number of occasions. He has consistently impressed me with his intellect and his integrity.

Briefly, his background: Judge Hurley graduated cum laude from St. Anselm's College where he won the faculty award for outstanding student leadership. He was a student in advanced courses in theology at St. Vincent de Paul Seminary in Boynton Beach, FL. He subsequently received his law degree from George Washington University. After a period working here in Washington as a clerk for a U.S. district judge and later for a court of appeals judge, he came to Florida where he has served in a variety of important judicial positions.

Since 1975 when he was appointed by then Governor Reuben Askew to the county court in Palm Beach County, he has served on the bench at the county court, the circuit court, and at the appellate court level.

One of the interesting aspects of Judge Hurley's career is that in 1985, after having served as an appellate judge, he requested to be reassigned by appointment to the trial bench. He stated that he felt that that was where he could render the greatest service, and also that he felt his experience as an appellate judge would contribute to his renewed service at the trial court level.

So this is a man who is truly interested in service to the people. He has prepared himself for the challenges that he will face in one of the most demanding of our U.S. district court benches. I am particularly pleased at the sensitivity that this committee has given to the Federal district court in Florida which has had, unfortunately, a recent tradition of large numbers of vacancies. Judge Hurley's confirmation will move us a step closer towards having a full Federal court bench in Florida.

Madam Chairperson, I appreciate very much your courtesies today and urge your early attention to this excellent nominee.

[The prepared statement of Senator Graham follows:]

PREPARED STATEMENT OF SENATOR GRAHAM

Mr. Chairman, I am pleased to introduce Judge Daniel T.K. Hurley to the Senate Judiciary Committee as a nominee for the U.S. District Court for the Southern District of Florida.

My Florida colleague, Senator Connie Mack, would have liked to be here with me today, but he had an unavoidable conflict. He asked that I convey his support for Judge Hurley.

Over the years, I have followed Judge Hurley's career and met with him many times. He has consistently impressed me with his intellect and integrity.

Let me share some of Judge Hurley's background with you. Judge Hurley graduated Cum Laude from St. Anselm's College where he received the faculty award for outstanding student leadership.

For a year after graduation, Judge Hurley took advanced courses in theology at St. Vincent de Paul Seminary in Boynton Beach, FL.

He went on to receive his law degree from the George Washington University, where he was once again recognized with an award for outstanding student leadership, this time by the student bar association.

Judge Hurley attended law school at night. During that time, he worked for 2 years in the U.S. House of Representatives.

After graduating from law school in 1968, he clerked for a U.S. District Judge in the District of Columbia and later for a U.S. Circuit Judge on the court of appeals, also in the D.C. Circuit.

From 1973 to 1975 he served as executive assistant State attorney for the 15th Judicial Circuit of Florida, where he stayed until appointed to the bench.

In 1975, Judge Hurley was appointed by Governor Reubin Askew to the county court for Palm Beach County. He was subsequently elected to a 4-year term without opposition.

In 1977, he was again nominated by Governor Askew to the circuit court for the 15th judicial circuit, where he was subsequently elected to a 6-year term without opposition.

Two years later, while serving as Florida's Governor, I had the honor of appointing Judge Hurley to the fourth district court of appeals, where he was retained in a merit retention election with a positive vote of 92 percent.

In 1985, Judge Hurley returned to the 15th circuit. He said he missed the direct interaction with the lawyers and litigants that comes with being a trial judge. In addition, he felt his experience on the appellate bench would make him a better trial judge.

Judge Hurley is well suited for the trial environment, having served in the 15th circuit for close to 10 years.

In 1988, 1989, and 1991 Judge Hurley was elected unanimously by the 46 other judges in the 15th circuit to serve as chief judge. This expression of confidence by his peers is yet another testament to Judge Hurley's judicial merit.

Throughout his entire judicial career, Judge Hurley has demonstrated his commitment by teaching in his spare time. He serves as a faculty member at the Florida College for New Judges where he teaches family law and judicial philosophy.

Judge Hurley is held in the highest regard by the judicial community.

Upon learning that he had applied for a U.S. district court judgeship, Florida supreme court's highly respected former chief justice Ray Ehrlich had these kind words to say:

"Judge Hurley is truly an excellent trial judge. He is a warm and understanding person, and I hope to have the opportunity to practice before him one day. There is no finer trial judge on the Florida bench than T.K. Hurley."

Judge Hurley's confirmation will go a long way to relieve the now overburdened caseload of the U.S. District Court for the Southern District of Florida. I am confident that Judge Hurley will serve this court with the same devotion and distinction he has demonstrated during his 20-year judicial career. Thank you.

Senator FEINSTEIN. Thank you, Senator.
Representative, welcome.

**STATEMENT OF HON. HARRY JOHNSTON, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF FLORIDA**

Mr. JOHNSTON. Thank you very much, Madam Chair. I am Harry Johnston, 19th Congressional District in south Florida.

Briefly, I practiced law in Palm Beach County for 30 years and had the pleasure of practicing with Judge Hurley—a very, very unique career. I might point out, though, that every year the lawyers in Palm Beach County used to judge the judges—it was kind of a catharsis on our part, getting back at them. For a decade, Judge Hurley—and there were 45 judges in this county—was No. 1 every time.

He has had a very eclectic career starting as a prosecutor in Palm Beach County, a county judge, then a circuit judge. And Senator Graham is somewhat modest because it was at the time that he was Governor that he had the foresight to perceive a unique legal ability and appointed him to be appellate judge and then back to the circuit court again.

I have had the opportunity to know this man for several decades, Madam Chair. There could be no finer appointment that the President could make nor the U.S. Senate could confirm, and I strongly recommend an expeditious appointment of Judge Hurley to the U.S. District Court.

Thank you very much.

Senator FEINSTEIN. Thank you very much, Representative Johnston. Thank you, Senator Graham. Judge Hurley, thank you, and we will hear from you shortly.

I am going to exercise a prerogative of the Chair, and since Senator Hollings is here and Senator Thurmond is on this committee, and Cameron Currie happens to be a woman and now there are women on this committee, I think we should take her first. So perhaps if you would come forward, if you would raise your right hand please, and affirm the oath. Do you swear that the testimony you shall give in this proceeding shall be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. CURRIE. I do.

Senator FEINSTEIN. Ms. Currie, if any of the members of your family are present in the Chamber, we would love to meet them.

**TESTIMONY OF CAMERON CURRIE, COLUMBIA, SC, TO BE U.S.
DISTRICT JUDGE FOR THE DISTRICT OF SOUTH CAROLINA**

Ms. CURRIE. Thank you. My parents, John and Virginia McGowan, are here, and my sister, Jeanne McGowan; my three children, William, Cameron, and Rutledge; and their grandmother, Ms. Sarah Currie. I also have friends from South Carolina who also came, and I appreciate their being here.

Senator FEINSTEIN. Thank you very much. Just one editorial comment. You have three beautiful children, and you look so

young, and you have done what you have done. That is truly quite amazing.

Senator HOLLINGS. And she is a single mother. Tell that to Vice President Quayle.

Senator FEINSTEIN. All right. [Laughter.]

Ms. CURRIE, certain commentators have stated that settling cases early would relieve at least a portion of their docket backlog. However, settling a case is often easier said than done. Sometimes a specific case should be settled for the sake of judicial economy and fairness to the litigants.

As a magistrate, what steps did you take to encourage settlement in appropriate cases?

Ms. CURRIE. The primary role as a magistrate was in the early setting of a scheduling order in the case and holding the parties in the case to that scheduling order and holding a pretrial conference in the case to assess whether or not there was a reasonable probability of settlement in the case.

In addition, if the parties were willing to do so and the case was to be tried by a U.S. district judge and not by me as U.S. magistrate judge, I offered to undertake, to assist in settlement negotiations since I would not be conducting the trial. As a U.S. district judge, I would obviously have to have a more limited role in attempting to assist in settlement because I would be the one conducting the trial if settlement did not take place. But I believe that the utilization of U.S. magistrate judges can greatly assist in the early settlement of cases.

Senator FEINSTEIN. Thank you.

Now, on the other hand, some litigants would prefer their day in court, even to a favorable settlement. What did you do when faced with a case that, in your view, should have been settled but one or all of the parties wanted to proceed with trial.

Ms. CURRIE. Hands off. In other words, that is their right. If they wish a trial and they have been fully apprised of all the facts and circumstances and I feel that the attorneys have adequately advised them of their settlement options and they wish a trial, that is their right. I would back off totally and proceed with a trial.

Senator FEINSTEIN. Thank you.

Now, you have had legal experience as a Federal district court magistrate, as a prosecutor, and in private practice. Again, for one so young, that is quite amazing. But how do you think these experiences have prepared you to be a Federal judge?

Ms. CURRIE. As a Federal magistrate, I really learned the inside of the courts. I learned how everything works, how the paper flows, how the cases come in and are processed, and I learned how to conduct myself in a courtroom.

But as a prosecutor and as a defense attorney, I believe I learned even more because I learned how it feels to be treated by a judge. And I always want to treat people in my courtroom the way I would want to be treated in a courtroom. I think I was a better prosecutor after I was a defense attorney because I knew how it felt to be a defense attorney. And so I believe that having been all three, I know how it feels to be in the shoes of each one in the courtroom, and hopefully that will make me a better judge.

Senator FEINSTEIN. What do you perceive to be the primary differences between your position as magistrate and your hopefully future position as a Federal judge?

Ms. CURRIE. In South Carolina, there is quite a distinction. The U.S. magistrate judges in South Carolina labor under a tremendous caseload of what are referred to as prisoner petitions and Social Security cases, and because of that huge caseload, they do not have the time to conduct as many of the more advanced proceedings in civil cases as in other districts.

As a district judge, I will be having full felony jurisdiction and conducting criminal trials and civil trials, and so there will be quite a difference in the amount of trial work that I will be doing as a district judge, if confirmed, as opposed to as a U.S. magistrate judge.

Senator FEINSTEIN. Just out of curiosity, in South Carolina what percentage of the trial docket is criminal as opposed to civil? Do you happen to know?

Ms. CURRIE. My estimate would be around 30 percent would be criminal. Some of the more recent appointees to the district court have estimated to me that the criminal work takes up from 20 to 30 percent of their time as opposed to a much heavier caseload in civil areas.

Senator FEINSTEIN. If confirmed, at some point you might be faced with applying a decision of the court of appeals for the fourth circuit with which you disagree. If confirmed as a district court judge, would you have difficulty applying or enforcing precedents with which you did not agree?

Ms. CURRIE. I would have no difficulty. Those are the rules.

Senator FEINSTEIN. Rule 11 of the Federal Rules of Civil Procedure allows judges to impose sanctions against lawyers or parties who file frivolous lawsuits. Recently, there has been a lot of debate over the courts' increased willingness to punish litigants under rule 11. Some lawyers now argue that the rule is being applied to chill pursuit of creative arguments in developing areas of the law, such as civil rights.

As the chief judge of the New York Circuit Court of Appeals has put it, "Today's frivolity may be tomorrow's precedent."

Given your experience as a litigator and as a magistrate, what do you think of these concerns, and how might you respond to them in your courtroom?

Ms. CURRIE. I would be very hesitant to use rule 11. I believe that the court can police itself without imposition of sanctions, and I believe that if a judge establishes a method of doing business in his or her courtroom and the attorneys recognize that filing a frivolous lawsuit is not going to win them any points in the long run, they will cease and desist from doing that without having to be sanctioned. I would only sanction someone as a last resort.

Quite often, as a magistrate, I found that the lowliest pro se prisoner petition might actually have some merit in it if you really looked carefully at it, and you cannot just generalize and say that these lawsuits that are filed are always frivolous. Each one has to be carefully examined.

Senator FEINSTEIN. Now, you mentioned in your questionnaire that you were a member of the merit selection panel for the re-

appointment of U.S. magistrates, and you have also been a U.S. attorney.

Based on your experience on that panel and your experience as a trial attorney, what qualities do you consider important in prospective judicial nominees?

Ms. CURRIE. In my opinion, the experience level is very important. Having had the various experiences in the court system is very significant. But even more important than that is a perspective that is gained by that experience; that is that you are not the most important person. The most important thing is the system and having the justice system work and having the people that come into the courtroom feel that they have gotten a fair shake. And I believe that if you pick people who have personalities that treat people fairly, who are maybe strict but by the same token courteous, that those qualities in the long run will engender more respect for the system than perhaps someone who is irritable, short tempered, and rushed to judgment.

Senator FEINSTEIN. One final question. Because you are very young and this is an appointment for life, you could be a Federal judge for a long time. How at the end of your career would you like to be regarded? As what kind of judge would you like to be regarded?

Ms. CURRIE. I wish I were as young as you seem to think I am. [Laughter.]

But I am 45 and——

Senator FEINSTEIN. That is still young.

Ms. CURRIE. I do not feel quite that young.

At the end of my career—recently, in fact, the judge whose place I will be taking if confirmed is Judge Falcon Hawkins, who recently took senior status. Senator Hollings appointed Judge Hawkins back in 1979. He, when he stepped down, had the respect of everyone because he had the best judicial temperament. He was the most evenhanded and steady judge. He was smart. He was always prepared. But no one ever walked out of Judge Hawkins' courtroom feeling that they were not treated fairly. Even the defendants who had been found guilty and sentenced always felt that Judge Hawkins gave them a fair trial and played by the rules.

If I could be looked upon like Judge Hawkins is when I step down, then I would have achieved my goal.

Senator FEINSTEIN. Thank you. Most impressive.

Senator Thurmond, any questions?

Senator THURMOND. Thank you, Madam Chairman.

I want to welcome you to Washington and to the Judiciary Committee.

Ms. CURRIE. Thank you.

Senator THURMOND. You come from an able line of lawyers. I believe your grandfather was an able lawyer, and your father is an able lawyer. And I know you, and you are an able lawyer. So you can well be proud of your lineage.

Ms. CURRIE. Thank you, sir.

Senator THURMOND. Under our tripartite system of Government and under the Constitution, the Congress makes the law; the Chief Executive, the President, enforces the law; the judiciary interprets the law. The judiciary has no authority to make law, but some of

the judges seem to think so and have taken some steps along that line, to which I have been strongly opposed.

Do you agree with my interpretation of the Constitution on that?
Ms. CURRIE. I do, Senator.

Senator THURMOND. We frequently hear the argument that courts act in response to various social problems because the legislature has failed to act on its own. How would you respond to this defense of an activist judiciary?

Ms. CURRIE. Well, if the legislature fails to act in a particular area, then it is not the function of the judiciary to fill that void. It is the function of the judiciary to declare that the void has not yet been filled by the legislature.

Senator THURMOND. I am glad to hear you make that answer because some judges feel if it is a noble cause, they will go ahead and act whether there is legal authority or not. But Congress makes the law. We have to constantly remind some of the judiciary about that.

The phrase judicial activism is often used to describe the tendency of judges to make decisions on issues that are not properly within the scope of their authority. What does this phrase mean to you? Does that mean as I described it to you?

Ms. CURRIE. I believe that in the Federal court arena the jurisdiction is very narrowly limited, and only when there is an actual case or controversy and only when there is actually Federal jurisdiction present should a judge get involved in the case. And if a judge oversteps those bounds and gets into a case that is not ripe or is not a case or controversy or does not have Federal jurisdiction, I would call that judicial activism.

Senator THURMOND. I consider judicial temperament to be a very high quality for a judge. The American Bar Association considers that one of the four main elements, judicial temperament. I have witnessed Federal judges, I have seen Federal judges yell at lawyers, embarrass lawyers, embarrass witnesses, embarrass jurors. Well, they have all the power in the world. There is no one that I know of in our society who has more power than the Federal judge, and I think the more power you have, the more humble you ought to be. And there is no excuse for doing that.

Would you give me your thoughts on that?

Ms. CURRIE. When I became a magistrate, my father said to me, "I hope you won't get black robe-itis." And I said, "Well, I surely won't because magistrates don't wear robes in South Carolina." But then because there was a female magistrate, they decided that magistrates should wear robes because they thought I would look too timid, I guess, on the bench. So magistrates began wearing robes in South Carolina. And each time I put that robe on, I remind myself that I am just a person. Just because I am a judge, it does not make any better than anyone else. And if I can treat people the way I would like to be treated, I think that would be the appropriate judicial temperament.

Senator THURMOND. As our distinguished chairman said a few moments ago, you are young, you have a long time to serve and I am just wondering what you feel will be the most rewarding aspect of serving as a Federal judge.

Ms. CURRIE. One rewarding aspect would be that I will be the only female Federal judicial officer in South Carolina, and I would hope that that would give women in South Carolina a feeling that they, too, are represented in Federal courts.

Another rewarding aspect will be that I hope by doing a good job and being well regarded, that that will continue to bring the Federal courts in South Carolina into high regard, because I do believe that our Federal courts in South Carolina are highly regarded and are generally felt to be doing a very good job, and I hope to contribute to that.

Senator THURMOND. I consider you an able lawyer and a fine woman, and I think you will make an excellent judge. I will be glad, of course, to support you and do all I can on your behalf.

Madam Chairman, I have got to go on a trip this afternoon and will not be able to stay for the rest of the nominees, but I have heard favorable reports on their qualifications. But I just want to tell Ms. Currie that we are glad to have her here. I wish her well on the bench, and good luck to you and your family.

Ms. CURRIE. And thanks to you for all your help.

Senator HOLLINGS. Madam Chairman, may I make a comment?

Senator FEINSTEIN. Yes.

Senator HOLLINGS. It does not concern the nominee but, rather, the panel, the Judiciary Committee. We have a defect in the system, and it should be repaired immediately. I am hearing the very careful and poignant questioning by the panel. I am talking and listening about power. And earlier this morning I had the appropriations hearings for the U.S. Supreme Court and our judiciary, and an outstanding complaint, among others, was, look, as a title II U.S. district judge, I must submit to the confirmation process, but as an assistant U.S. attorney there is no such requirement or process.

Yes, the U.S. district judge has a lifetime appointment, but we have given tenure to the assistant U.S. attorneys without any kind of review or process. Yes, the U.S. district judge is required to comply with sentencing guidelines. The assistant U.S. attorney is in the back room making deals and changing around the sentence that the judge on the bench cannot change once the deal is made. And a lot of the bad sentencing is coming about through this defect in the system. I was going to mention it, but there is no better time than this distinguished panel to hear it because it was just this morning, and I never realized that feel was so strong amongst these senior U.S. district judges, and they say these youngsters come along, the assistants, there is no confirmation, they are in the back room, they are giving out sentences. And here we are submitted to the process and everything else, and not at all to the system that we have given assistant U.S. attorneys without any confirmation process and tenure.

Senator FEINSTEIN. Well, you are correct. The background checks, of course, are done. But I will personally, along with Senator Thurmond, bring your comments to the chairman of our committee. I actually think you have raised a very good point. As one who has submitted a U.S. attorney, I think it might be worthwhile having a full confirmation process—if it does not slow it down any more than it is. As you know, all these people here have been wait-

ing for a long time. But I thank you for those comments. I think they are very good comments.

May I thank you, and it is certainly my pleasure to be supportive of your candidacy as well. You have done very well today, and thank you for being present.

Ms. CURRIE. Thank you.

Senator FEINSTEIN. Thank you, Senator Hollings.

Senator HOLLINGS. Thank you both very much.

Senator FEINSTEIN. Now we will return to Franklin Burgess. If Mr. Burgess would please come forward, and Senator Thurmond is excused. You have just me to contend with, so it should not be too difficult.

Would you please raise your right hand? Do you swear that the testimony you shall give in this proceeding shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge BURGESS. I do.

Senator FEINSTEIN. Thank you, Judge Burgess.

If any members of your family are here and you would like to introduce them, please do.

TESTIMONY OF FRANKLIN D. BURGESS, TACOMA, WA, TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF WASHINGTON

Judge BURGESS. Thank you. My wife Treava was unable to attend as we have two young school-age children: Frava, age 11, and Whittney, age 6. She stayed behind to keep them in school.

But I do have moral support present today. Present is my daughter, Dr. Cheryl Burgess-Morris, her husband Jon Paul Morris, my mother-in-law Mrs. Georgia Whitted, my sister-in-law Ms. Gerry Jangha and last but certainly not least, my dear dear friend, the Hon. Jack E. Tanner, senior district court judge from the western district of Washington.

Senator FEINSTEIN. Welcome, and thank you very much for being here, sir. We appreciate it.

Let me begin, Judge Burgess. You have been a magistrate also for a number of years. What do you perceive to be the primary differences between your current position and a Federal district judge?

Judge BURGESS. Well, in my particular district, being the only magistrate in Tacoma, it kind of limits what I do as to what might flow from the district judges to me. That is probably the main difference, and the limitation on the jurisdiction in terms of authority. As you know, we are limited to misdemeanor in the criminal area, and, of course, there is no limitation as to the civil end based on the consent of the parties.

That is probably the real distinction, but after doing this for some 13 years now, it is different but yet still somewhat the same. So I feel that that leads me directly into this position that I am seeking here today.

Senator FEINSTEIN. What areas of the law, if any, do you feel you need to study to get up to speed, should you be confirmed as a district court judge?

Judge BURGESS. As I have mentioned, in being the only magistrate judge in Tacoma, it kind of—at least I have been mostly

moved in the direction of criminal matters more than I would like to. And I would say of any area that I would like to quickly get into to a great extent than I have already, it would be in the civil end. And I have had some opportunity to do that by going over and sitting with the chief for a little bit, and Judge Tanner and Judge Bryant from my district would send matters. You will find that all districts will do it differently. In our district, we normally do more settlement conferences than we do having the matter referred upon filing.

Senator FEINSTEIN. As a matter of curiosity, what percentage of cases in your district will be criminal?

Judge BURGESS. If I am correct in this, I believe that borders on about 60 percent at this time. At least that is what I have—

Senator FEINSTEIN. That is the same as the ninth circuit court, which is California. It is a very increasingly heavy criminal calendar.

Judge BURGESS. Yes.

Senator FEINSTEIN. Now, you have heard, as you have mentioned, many criminal cases. What are your views on the role that rehabilitation might play or should play in Federal criminal sentencing matters?

Judge BURGESS. I think when you are talking criminal matters, not only are you there as the judge applying the law, but you are dealing with people, and I do not think we should ever lose sight of that. And I guess it is always my hope that all is never lost and that there should be something, at least trying to address that. That would be my focus. I think that should be the focus of the bench.

Senator FEINSTEIN. There has been a great deal of attention to Federal courts' increased caseloads, certainly in my area, and the resulting problem of docket backlogs. This has had an adverse effect on the litigants before the courts who have been forced to suffer at least some delay in the resolution of their claims.

If confirmed, what steps will you take to ensure that your docket progresses at as quick a pace as is possible?

Judge BURGESS. Well, I have thought of that in this sense: the magistrate system I think is a very valuable system, and being in it, of course, I know a lot about it, and I believe in it. And I believe by sending cases to the magistrate to handle—and we also have a system in our State called a 39.1 where things go out for mediation or we may do an alternative dispute resolution of some other kind. Those matters are there and are available, and I think the court should make use of them. I think that would help to alleviate the backlog.

Senator FEINSTEIN. As you well know, every lawyer has a professional obligation to devote at least part of his or her time to serving the disadvantaged. Various State bars have considered whether this should be a mandatory requirement that all lawyers engage in pro bono work.

You have represented indigent persons through the public defender's office and through the Legal Aid Society. You have also provided free legal counsel through the NAACP and the Urban League, and I think you are to be commended for that.

In your view, how important is it for an attorney to perform pro bono work?

Judge BURGESS. Why, I think it is important. I think it is important from the standpoint, at least with what has happened to me in terms of where I am, is that there are a lot of people responsible. And I think when you have a lot of support, you kind of owe something back. And this is one way to do that.

Now, whether that should be done, say, in a mandatory sort of a way, I am not so sure about that. But it ought to be expected. And I think there ought to even be an obligation to do so. At least that is my feeling about it.

Senator FEINSTEIN. Do you feel the Constitution permits application of the death penalty?

Judge BURGESS. Well, let's approach it this way: I think that when you are on the bench, of course, the Constitution, being the supreme law of the land, the court is under an obligation to follow the law. And that is the way I have seen it, and I have always seen it that way. My position is that if the law gives that right or that obligation or duty to the judge, it is the judge's duty to follow that.

Senator FEINSTEIN. And what are your personal feelings in that regard?

Judge BURGESS. My personal feeling is that I do not know if I could sit and say that you could show me something that I would totally not believe in. I think you have to analyze it, and you have to weigh it, and you have to seriously weigh it because you cannot ever turn it around. It is an irrevocable procedure. You must weigh that and make sure that when you impose that or that it is imposed, that it is the only alternative. So I guess I would be hesitant to make sure that I have not turned over every stone before I am convinced that you should totally close the door, and I believe that process is going on. But the court is stuck with the law, and if the law is followed and followed to the letter, then I think that is the best the court can do.

Senator FEINSTEIN. If confirmed, at some point you could be faced with applying a decision of the Court of Appeals for the Ninth Circuit with which you disagree. If confirmed as a district court judge, would you have any difficulty in applying or enforcing precedents with which you did not agree?

Judge BURGESS. No.

Senator FEINSTEIN. That completes my questions, and I want to say thank you very much. It is my pleasure to be of support, and I wish you godspeed and a very constructive tenure if you are confirmed by all members and by the Senate. Thank you very much for being here.

Judge BURGESS. Thank you, Senator.

Senator FEINSTEIN. May I ask that Judge Michael Davis come forward, please?

Our next nominee is Judge Michael Davis, who has been nominated to be district court judge for the District of Minnesota. Would you please raise your right hand?

Do you swear that the testimony you shall give in this proceeding shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge DAVIS. I do.

Senator FEINSTEIN. Thank you very much.

Judge Davis, if you have members of your family here and would like to introduce them, I would sure like to meet them.

**TESTIMONY OF MICHAEL DAVIS, MINNEAPOLIS, MN, TO BE
U.S. DISTRICT JUDGE FOR THE DISTRICT OF MINNESOTA**

Judge DAVIS. Yes, I do. My mother is here. I would like her to stand. She is the reason why I am here. My wife, Sara Wahl, and my two children, Mike and Alex. And my brother, Chet, and my sister-in-law, Rebecca. And I have a host of people here, if I can quickly go through the list.

I have Ken Tilsen, Prof. Ken Tilsen, who is on our merit selection process for this position. He is a professor at Hamlin Law School, a litigator in our community for over 30 years, and I thank him for being here today.

I have some of my former law clerks present that have migrated East. I have Carol Johnson. I have Dev and Alyn Kayal. Please rise. Friends, college friends: my running buddy, Tom Hardy; Fran Hassan is present and Jeff Hassan; and I also have a real close friend who is in the diplomatic corps for the Republic of Benin, Francis Loko.

If I have missed someone, I apologize.

Senator FEINSTEIN. That is quite a battery of moral support.

Judge DAVIS. Yes.

Senator FEINSTEIN. Judge Davis, you have served on the Minnesota State court for many years. Why do you want to move to the Federal bench?

Judge DAVIS. Madam Chairman, it was not a dream of mine. I was quite happy where I was. I am a trial lawyer and a judge. I love what I do in the courtroom. I could never be an appellate court judge, and I turned down many positions to move on.

It just happened that the positions opened up. We had two openings. People from the community talked to me about it and broadened my horizons, and I thought that based on what I have done for the past 11 years—I just had my 11th year anniversary on the bench—that I would submit my name and let the chips fall where they may. And it turns out that I am here.

I can tell you that no matter what the outcome is here, the outpouring of support for me and people talking about what I have done for the last 11 years has made this whole process worthwhile.

Senator FEINSTEIN. In what ways do you expect sitting on the Federal bench will differ from your experience in the State court?

Judge DAVIS. It will be less like a McDonald's. We classify—

Senator FEINSTEIN. Did I hear you right? Did you say less like McDonald's?

Judge DAVIS. McDonald's, fast food.

Senator FEINSTEIN. That is what I thought you said.

Judge DAVIS. In State court, we are in a metropolitan area, and we handle thousands of cases. And I serve on the largest bench district in our State, and we have to handle many cases. I know that in Federal court the pace is a little slower. The intellectual challenge is more demanding, and I think I am up to that.

Senator FEINSTEIN. Judge Davis, in your questionnaire, you stated that you served on the Racial Bias Task Force created to deter-

mine where racial bias exists and its extensiveness in Minnesota's legal system. This task force issued a report making recommendations about how to eliminate such bias.

Your questionnaire also indicated that you sat on an attorney general's task force on the prevention of violence against women.

As you may know, the Senate recently passed the Violence Against Women Act, and among other things, this legislation addresses the problem of gender bias in the courts, providing training for State and Federal judges on a number of issues, including sexual assault, domestic violence, and racial and gender stereotyping.

Based on your experience, do you think that this kind of training for a judge is necessary? And how do you think it would affect judicial decisionmaking?

Judge DAVIS. The quick answer is yes. But if I could explain for a few minutes, our State has been very progressive in dealing with these issues. In 1989, our supreme court issued a gender bias report. In 1993, as you have said, we issued a racial bias report.

Our State legislature mandated that our supreme court do these studies to take an internal look to see how are we doing: how we are doing dealing with gender issues, how we are doing with racial issues. And it is very important.

When the gender bias report came out in 1989, I was on the bench. The first thing was denial—we are not doing these things. But what happened is that we all came together. It was a catalyst for discussion in that we started looking at issues that the male judges, including myself, had never thought about, and dealing with how we deal with lawyers that are women, victims that are women, defendants that are women, throughout the whole system. And I can tell you that with the gender bias report, it made a tremendous change in how our system works.

As you well know, most of the law schools now are graduating 50 percent women, and so we have to make sure that the powers that be—and certainly the judges are powers that be—understand the differences with women, the economic barriers that are placed there. Recently my county bar association issued a task force report dealing with the glass ceiling, dealing with women and minority lawyers not making it to the upper echelons in the bar and the law firms. And so we are ongoing and challenging that.

Dealing with the racial bias task force, I must say that when we surveyed the judges, the probation officers, and the prosecutors and defenders, over 75 percent of them said that there was a racial bias in the system, but it was subtle and hard to detect, that it was institutionalized and that little things added up into inequality of sentences, inequality of services given to people that are a minority.

Senator FEINSTEIN. Thank you very much.

Judge DAVIS. Yes, most definitely, dealing with education, judicial education. It is mandated by our State that all judges have gender and racial bias education. We have put on programs at our annual meetings dealing with these issues. And our chief justice has gone on record and set up in each judicial district in our State a diversity committee to deal with these issues, both gender and racial bias.

Senator FEINSTEIN. Has it made a difference?

Judge DAVIS. Oh, most definitely.

Senator FEINSTEIN. Can you give me any specific examples of the difference?

Judge DAVIS. When I first started practicing, women lawyers were called lawyer-ettes by judges.

Senator FEINSTEIN. I guess I am a Senator-ette.

Judge DAVIS. And certainly through the progress over the years, we have seen that that does not occur, that we have many more—I do not know if you know that our supreme court is a majority of women.

Senator FEINSTEIN. I did not know that. Interesting.

Judge DAVIS. And so over the years things have opened up. The system has opened up, that we are not just looking at one type of person, that it is inclusive of all the people that make up our community—women, minorities—and so it has made a tremendous difference.

On my bench, I would say between 20 and 30 percent are women, and it does make a difference. It does make a difference in how men deal with domestic issues. Certainly our gender bias report put it out front, dealing with domestic violence, and now we have—the legislature passed very strict domestic violence laws. They are not just on the books, but they are being enforced. And certainly we need to modify and to make sure that they continue to be enforced, but it is very important.

Senator FEINSTEIN. Judge Davis, you have written a paper discussing the court's role in promoting settlement, and certain commentators have mentioned that settling cases early would relieve at least a portion of the docket backlog.

As a judge, sometimes you must have felt that a case should be settled for the sake of judicial economy and fairness to the litigants. Settling a case, however, is easier said than done.

What steps have you taken to encourage settlements in cases?

Judge DAVIS. I use a number of methods, and there is no right or wrong way because it depends on the litigants and the type of case. But one of the things that I think all the studies show is that if the judge takes an active role and gives a definite trial date, the case will come to resolution in some form, in some manner.

In our State, close to 94 percent of all cases settle, and so there is just a small percentage that go to trial. And, of course, when do they settle is always the question. Do they settle on the courthouse steps, or do they settle before? Because if they settle much earlier, then the cost is down.

That is where a judge becomes involved. If I have the opportunity to be a Federal judge, then I will do the same types of things that I did as a State judge: early, getting involved in the case, status conferences, finding out where the lawyers are at, where the parties are at, and making sure that they are talking.

One thing that we are not doing now is communicating to each other, and you would be amazed how there will be a flurry of paperwork back between the lawyers, but they are not really talking about settlement. I call it a rooster dance. They have their feathers up, and they are dancing around. And it is important that the judge come in and mediate that and try to get the parties to be re-

alistic about what the issues are and what the settlement potential is.

Again, like you say, there are cases that will not settle and will go to trial. In my papers, I talk to the judges and say you cannot get personally involved in the case so you feel bad about the case not settling and, therefore, you become not impartial in your trying the case. You are trying to bring the parties together. Some cases will settle, and some will not. But if they do not, you try them.

Senator FEINSTEIN. The same question about the death penalty that I just asked. I neglected to ask it the first time. I regret that.

How do you feel about it? Can you enforce it?

Judge DAVIS. Yes, I can enforce it. It is the settled law of this land. The Supreme Court has spoken on that. I must say that we do not have the death penalty in the State of Minnesota, so I am not up to speed with all the issues dealing with the death penalty because we have not had the death penalty since the early 1900's. And so we do not have the problem that other States have. We have not had to deal with that.

But all the years I have been on the bench, and part of that being a lawyer, the law of the land comes from the Supreme Court or from Congress.

Senator FEINSTEIN. Thank you.

If confirmed, at some point you could be faced with applying a decision of the Court of Appeals for the Eighth Circuit with which you disagree. If confirmed, would you have any difficulty applying or enforcing precedents with which you did not agree?

Judge DAVIS. The emphatic answer is no. Again, to give you the philosophy that I have about being a trial court judge, I look to the court of appeals and the Supreme Court to give me the rules to try the case. I am there in the courtroom trying the case. If I wish to be philosophical, I would certainly go for another position or be a law professor. But I love the trial court. It is where the rules are. We play by the rules, and those are the rules that come from the law and from the court decisions.

Senator FEINSTEIN. And how at the end of a long career would you want to be regarded as a Federal judge?

Judge DAVIS. "He was just."

Senator FEINSTEIN. I cannot beat that. Thank you very much. I appreciate your time. Thank you. My pleasure to support you.

Judge DAVIS. Thank you very much.

Senator FEINSTEIN. May I ask that Judge Haggerty to please come forward?

Judge Haggerty, welcome. Would you please introduce any family members that might be here?

Judge HAGGERTY. Yes, I would, Senator. First I would like to thank Senator Hatfield and Congressman Wyden for speaking on my behalf.

At this time I would like to introduce my wife, Julie Haggerty; my son, Ronnie; my sleepy daughter, Patricia, who is 8; and my daughter, Felicia, who is 6. But I would also like to say that my sister, Mary Jo Henderson, and my niece, Paula Henderson, are unable to attend, as well as my mother-in-law, Ms. Evelyn Blair, and my sister called today to say that she was not feeling too good.

But I would also like to acknowledge my wife's brothers and sisters and their families who also were unable to attend today.

Senator FEINSTEIN. Thank you very much. Would you please raise your right hand? Do you swear the testimony that you shall give in this proceeding shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge HAGGERTY. I do.

Senator FEINSTEIN. Thank you very much.

Judge Haggerty, you have been a county district court judge and a county circuit court judge for over 4 years. What do you perceive to be the primary differences between your current position and a Federal district court judge?

TESTIMONY OF ANGER HAGGERTY, PORTLAND, OR, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF OREGON

Judge HAGGERTY. I think the biggest difference will be in the manner that cases are assigned. In the Federal system, cases are assigned on a random basis initially to the judges; whereas, in the State court system, the judges are assigned on an ad hoc basis as the judge's time becomes available. That will be a difference, as well as the depth of the cases will be different, as well as the types of cases will be different. In State court, you pretty much have an agenda of criminal or personal injury type civil cases; whereas, in the Federal system, you have the full gamut of Federal cases that are called upon insofar as Federal statutes. Therefore, there is a much broader scope of cases to handle in the Federal system.

Senator FEINSTEIN. Now, much of your experience has been in State court, and you are going to be moving to the Federal level. Again, I want to ask you the heavy docket question. You are going to have a heavier caseload of constitutional, employment, and civil rights cases.

What steps do you plan to take to familiarize yourself with those areas of the law in which you might lack experience?

Judge HAGGERTY. Well, Senator, I think all of us are invited to attend the U.S. courts agenda for a number of hours, as well as there are programs offered through the Federal Judicial Training Center, as well as CLE's. And I have been told by a number of my colleagues that they have an open-door policy such that if I have any need to confer with a more senior, experienced judge, the door is open. I can walk in, sit down, and discuss the matter with anyone at any time.

Senator FEINSTEIN. Good. Now, as a county district court judge and a county circuit court judge, you have also presided over many criminal cases.

Judge HAGGERTY. Yes.

Senator FEINSTEIN. The Federal sentencing guidelines for criminal defendants have been the subject of debate, I guess from the very beginning. In fact, one district court judge resigned because, at least according to the press accounts, he could no longer follow Federal sentencing guidelines in criminal cases. The press reported that this Federal judge felt that the mandatory guidelines were too harsh and too rigid.

As a Federal judge, what would you do if faced with a situation where the sentencing guidelines called for you to impose a sentence that you felt was too harsh?

Judge HAGGERTY. I would impose the sentence.

Senator FEINSTEIN. You would impose the sentence. OK.

In 1989, the Oregon Supreme Court instituted an experimental program that permitted television cameras in Oregon State courts. In fact, you presided over a highly publicized case, *Berhanu v. Metzger*, which was televised. I am sure that you would agree that having cameras in the courtroom requires a balance between the value of a free press and the interests in having justice rendered fairly without distortion resulting from press intrusion.

Do you believe that cameras should be permitted in Federal courtrooms? And what limits would you place on the recording of court proceedings?

Judge HAGGERTY. Well, Senator, as you have indicated, the Oregon Supreme Court authorizes cameras in the courtroom. I would have to say that until such time as the administrators of the Federal system authorize the cameras, obviously they should not be in place.

From the State court system, I do believe it was advantageous not only to the media, but it was very advantageous to the public. A tremendous number of people were able to watch a case that had raised some interest that they would not have been able to do so but for the camera. And I would hope that at some future time a similar authorization would take place for the Federal system.

Senator FEINSTEIN. So as a Federal judge, I would assume that your policy would be that you would allow cameras in the courtroom?

Judge HAGGERTY. Once they were authorized I would. It is my understanding that at this time they are not authorized. So until such time as they are authorized, I would not, of course, allow it on my own volition.

Senator FEINSTEIN. And may I ask you the question about the death penalty?

Judge HAGGERTY. Certainly.

Senator FEINSTEIN. How do you feel about the death penalty, and would you be able to enforce it?

Judge HAGGERTY. I would have no problem enforcing the death penalty. Oregon has a death penalty. I have handled death penalty cases. But as yet, I have not been required to sentence anyone to death. But from a philosophical standpoint, I have no problems with the death penalty.

Senator FEINSTEIN. Thank you.

If confirmed, at some point you could be faced with applying a decision of the court of appeals for the ninth circuit with which you disagree. Would you have difficulty enforcing precedents with which you did not agree?

Judge HAGGERTY. None whatsoever.

Senator FEINSTEIN. Thank you.

Judge Haggerty, in evaluating candidates for the bench, this committee traditionally has looked not only to nominees' credentials and professional backgrounds, but also at their temperaments. A good temperament and demeanor are characteristics which I

think everyone would agree are some of the most important qualities needed in a judge.

You served on the Oregon Judicial Conduct Committee from 1989 to 1992. Given your background and prior experience, please speak a little bit about the role and significance of judicial temperament as you see it, and indicate what elements of this temperament you consider the most important.

Judge HAGGERTY. Well, I believe judicial temperament is one of the highest qualities a judge can possess. In that regard, I think a judge's patience fits into that category. I also believe a judge's ability to work with people fits into that category. I do not believe that judges who display ill temper are best serving the judicial system. I think that speaks louder than a judge who displays the normal, calm temperament that most judges would hope they possess.

So I think it is a very important quality. I hope it is one I possess, and I would think that over time more and more judges will come around to seeing that a display of ill temper is just not appropriate for a judicial setting.

Senator FEINSTEIN. What qualities do you think are most important?

Judge HAGGERTY. Fairness, ability to make decisions, and I do not think you can exclude common sense. I think it is important that judges possess common sense and, where appropriate, apply common sense.

Senator FEINSTEIN. Assume for a moment you are going to be confirmed and you have a long career on the Federal bench. As you looked back on that career, how would you wish to be remembered?

Judge HAGGERTY. Well, I suppose I would like to be considered as one of the best jurists that Oregon has ever had. I would like to be considered as a person who was fair to everyone that came into the courtroom. And I would hope that no one would say they had any type of displeasure by having been in my courtroom.

I suppose that is how I would like to be remembered—just a fair judge.

Senator FEINSTEIN. Well, I think one might be rather hard, to have no one that ever has any displeasure. I imagine—

Judge HAGGERTY. Well, in saying that, I was reminded by the fact that Mr. Thompson had submitted a letter to the committee. So I guess I am going to have to work on improving my record.

Senator FEINSTEIN. Well, that might be one impossible part of your charge, but I want to say thank you very much for being here. It will be my pleasure to be supportive. And if you are confirmed, I wish you the best of luck. Thank you so much.

Judge HAGGERTY. Thank you very much, Senator.

Senator FEINSTEIN. And now last, but not least, would Judge Hurley please come forward? Sir, thank you for your patience. We have been trying to move this along. Actually, we have not done too badly considering the number of people.

Would you please raise your right hand? Do you swear in the testimony you are about to give that you will tell the truth, the whole truth, and nothing but the truth, so help you God?

Judge HURLEY. I do.

Senator FEINSTEIN. Thank you very much, and welcome. And if you would like to introduce your family, I would be delighted to meet them.

TESTIMONY OF DANIEL T.K. HURLEY, SOUTH PALM BEACH, FL, TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA

Judge HURLEY. Thank you very much, Senator. I would like to introduce friends from college days, Phylis and Bob O'Toole and their daughter, Stephanie; and two practicing lawyers today, but when I knew them, they were law clerks at the fourth district court of appeals in Florida, Paul Fitzpatrick, who is down from Hartford, and Doug Hughes, who practices with the Justice Department here in Washington. And then my old, very good friend from days when we were clerking here in Washington but who is now practicing in Washington is Paul Friedman.

Senator FEINSTEIN. Thank you, and welcome, ladies and gentlemen.

I am going to ask you, Judge Hurley, the temperament question here and give a little preamble. Once again, in evaluating candidates for the bench, this committee traditionally has looked not only to nominees' credentials and professional backgrounds, but also at their temperament. Good temperament and demeanor are characteristics which most agree are the most important qualities of a judge.

Given your background and prior experience, please speak for a few minutes about the role and significance of judicial temperament as you see it, and indicate what elements you consider to be the most important.

Judge HURLEY. Well, I think that judicial temperament is critical. I have seen so many hearings when you can look up and you can sense that the parties are antagonistic toward each other. And I think one of the things that a judge has to do is to calm the proceeding down, to alert people to the fact that this is their opportunity to speak their mind, but they need to sit and listen—it has to be an orderly process—and that you are seeking a rational result in this process. And so I think to some degree the judge sets the tone, and so I think that that is terribly important.

How you do it, it has been mentioned by many of the others today. I think listening to all of the participants, making sure that they understand that this is a fair proceeding and that you have not made up your mind until all of the evidence is in, listening to the argument. Sometimes judges have heard arguments in the past, but I think that you owe lawyers the right to argue on behalf of their client and to consider their positions and to let them know that you are doing that.

I think all of this goes to setting the appropriate tone, and only the judge can do that.

Senator FEINSTEIN. Thank you.

Judge Hurley, in the 1992 case of *Michaud-Berger v. Hurley*, the Florida Court of Appeals for the fourth district reversed your denial of the plaintiff's motion to disqualify you from presiding over the case. The plaintiff believed that because of your ruling against her

attorney in another, unrelated case, she would not receive a fair trial from you.

The appellate court found that although they had the utmost confidence that you would have been fair and impartial, the law required them to view the motion from the perspective of the plaintiff. Thus, they reversed your decision not to grant the motion to disqualify.

In this obviously difficult area of disqualification, how do you balance the need for swift and economical administration of justice with the concern of litigants?

Judge HURLEY. Well, Senator, the Florida law on that point is terribly clear, and the issue really is: Does the litigant have a well-reasoned ground to believe that the judge is not going to be fair toward them? So the judge's responsibility, at least in the State system, is to look at the pleading that is filed by the litigant. You assume it to be true. And if that states what is considered to be a well-grounded fear on the part of that litigant, the judge has an obligation to disqualify and step out of the case.

In that particular case, a lawyer for the plaintiff had come before me and had raised that issue, and I assured the lawyer that I would have stepped off myself had I any concern, and I inquired as to the lawyer whether that lawyer wanted to file a motion, and counsel for the plaintiff assured me that he did not. So I continued to preside in the case.

It was only when I issued a ruling with which that particular lawyer disagreed, at that point the client then filed the motion. It was my view that the position had been waived. The court of appeals took the position that could they assume that the client was aware of what the lawyer had done in the morning, they too would have found waiver. But the court said because the passage of time was so short, they were not willing to impute to the client what the lawyer knew.

I strongly feel that it is critical for clients to have confidence in the judge before whom the case is being tried, that a judge simply does not have any vested interest in the case. At the same time, those kinds of motions that come midtrial pose real difficulties because both sides have spent tremendous amounts of money gearing up and bringing the witnesses in. So it is a balancing process of making sure that you are being fair to both sides, but in the final analysis, as I have said, the Florida law is you need to look at the viewpoint of the litigant and determine whether the fear is well reasoned and well grounded.

Senator FEINSTEIN. Thank you very much.

As a judge in Florida, which is a cosmopolitan State where many languages are spoken, you must have encountered situations where the defendants do not speak English. How does the judicial system ensure that the rights of non-English-speaking defendants are protected?

Judge HURLEY. Well, Senator, you are correct. Florida, as is true of California, has a very diverse population, and I think you approach that in a number of ways. The first is to make sure that those things that go out from the court are in the appropriate languages so that they can be understood. We have court documents that are regularly translated into Spanish and into Creole because

we have a large Hispanic population, we have a large Haitian population.

The second thing that I think the court has to do is to make sure that you have trained, qualified interpreters. There are now evolving standards, both at the State level and I understand at the Federal level, so that you have interpreters who can be relied on to accurately interpret what is being said. I think that has always been a concern, particularly when you have lawyers who may understand the language and suddenly say to the judge, wait a minute, that is not what my client just said. The interpreter is not interpreting properly. So in our court, we have done a lot to insist that our interpreters pass State-recognized standards and, indeed, in a couple of instances, Federal standards as well.

I think those are two basic things that you can do to make sure that the courts are accessible and that the process is fair. .

Senator FEINSTEIN. Thank you very much.

Now, how do you feel about and would you enforce the death penalty?

Judge HURLEY. Senator, as you probably know, Florida has had the death penalty for some time, and I have, in fact, tried cases where the death penalty was a possible punishment. I have not been required to do that. Florida has a system whereby the jury has to weigh aggravating and mitigating circumstances, and only when the jury has recommended the imposition of the death penalty does the judge come in, if you will, on a second-tier review.

The short-form answer to your question is that I would follow the law, and the law is well settled that the death penalty meets constitutional muster.

Senator FEINSTEIN. Thank you. And I trust that means that philosophically you have no problem with it?

Judge HURLEY. I do not. I must say that I share Judge Burgess' concern, and I think it is the concern of all of us. It is a recognition that death is final. It is a terrible thing when you suddenly discover after the fact that the evidence was not as certain as you had hoped.

But I believe that the system that has been developed, this system for weighing aggravating and mitigating circumstances, the various level and tiers of review is sufficient to give you that level of comfort and certitude that it is properly being imposed. So I do not have any reservations about it.

Senator FEINSTEIN. Out of curiosity, what is the wait, the time, the length of time wait for the carrying out of a capital sentence in Florida?

Judge HURLEY. I am not positive that I could give you a precise answer, but my feeling is that it is close to 10 years. I know that that is a concern that the committee has had and that the State judiciary as well has in terms of trying to have some sense of relation between the event, the crime, the trial and the punishment. And so trying to deal with habeas corpus reform I know is something that this committee has spent a great deal of time with.

Senator FEINSTEIN. Not with very much success, however.

Judge HURLEY. It is a difficult issue, there is no question.

Senator FEINSTEIN. Yes. And let me ask you the same ending question. You have come to the end of a long career as a Federal judge; how would you wish to be remembered?

Judge HURLEY. I have listened to the answers of some of the other judges, and I must say I feel very much the same. I want litigants in any proceeding that I am involved with to leave feeling that they have been treated fairly. As you indicated, there is going to have to be a winner and there is going to have to be a loser. But I do not want that loser ever to leave feeling that they were given short shrift, that the judge's schedule was too busy, or that there was something else on the judge's mind.

I would like to have litigants feel that they have been treated carefully, that you understood their position, that you understood the law, and that you did your best to apply the law in their particular case. And if people can look back over your tenure on the bench and feel that you have done that, I would be more than satisfied with that point of view.

Senator FEINSTEIN. Thank you very much. That concludes my questions.

Judge HURLEY. Thank you.

Senator FEINSTEIN. I am very happy to be of support, and I wish you well in the confirmation process.

Judge HURLEY. Thank you so much.

Senator FEINSTEIN. Senator Durenberger has submitted a statement, and it will be made part of the record.

[The prepared statement of Senator Durenberger follows:]

PREPARED STATEMENT OF SENATOR DAVE DURENBERGER

CONFIRMATION HEARING ON THE NOMINATION OF MICHAEL J. DAVIS TO THE U.S. DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

Mr. Chairman and members of the Committee, I am pleased to appear before you today on behalf of Mike Davis and the people of Minnesota.

This is something of a first for me. In my nearly 16 years in the Senate this is the first district court nominee who I did not know prior to the nomination.

I have always placed extreme importance on the job of District Court Judge and I have always used an extremely high standard for my recommendations to the President for judicial appointment. I was blessed to know the late Judge Edward Devitt and to observe him on the District Court bench. As one of the outstanding jurists in the country, Judge Devitt has been my standard for service in that position. Since arriving in the Senate I have been gratified by the high praise I hear from around the country for the quality of all of the judges in the District of Minnesota—leading me to conclude that the standard I applied was a good one.

Because I had associations with all of the judges appointed during my tenure in the Senate prior to their appointment it was relatively easy to determine that they met this high standard. With Judge Davis, I had to go about it differently.

The task was made easier by the solid record of accomplishment behind Judge Davis. I know the record of this Committee already reflects Judge Davis's consistent high ratings from the lawyers in Minnesota, his leadership in the Minnesota courts in caseload management and efficiency, his knowledge of the law, and his willingness to make tough but fair decisions.

I will not belabor those points, as important as they are.

Instead I want to share two things you may not know from the record before you.

First—in my opinion, one of the most able judges to sit on the Hennepin County District Court—the same Court that Judge Davis now presides over—was Douglas K. Amdahl. Judge Amdahl was chief judge of that court and went on to be the chief justice of the Minnesota Supreme Court. He is now a highly respected “elder statesman” practicing law in Minneapolis. Judge Amdahl describes Judge Davis, whom he has known since the early 1970's, as “able, intelligent, articulate, knowledgeable and a man of integrity with good, common, practical sense.” I have a great deal of confidence in the judgment of Judge Amdahl and recommend his words to you.

Second—while I cannot claim a long friendship or intimate knowledge of Judge Davis as a person—after meeting with Judge Davis in my office I believe I met a man with solid values. He is dedicated to public service, but also to his family, his wife and two sons. He works hard at his job, but goes the extra mile to give back to his community through his writing, his teaching and his professional associations. He has demonstrated enormous compassion for the underprivileged and disadvantaged, but also a clear eye toward effective law enforcement and the administration of justice.

I believe Judge Michael Davis will live up to the standard of Judge Edward Devitt, or I would not be here today. I am pleased to join my colleague Senator Wellstone in urging this committee to send this nomination to the floor with a unanimous recommendation that he be confirmed.

Senator FEINSTEIN. I believe that concludes our hearing this afternoon. This committee will be adjourned.

[Whereupon, at 3:37 p.m., the committee was adjourned.]

[Submissions for the record follow:]

SUBMISSIONS FOR THE RECORD

QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

Cameron McGowan Currie

Former names used:

Cameron McGowan Blake (1970-1979)

Virginia Cameron McGowan (1948-1970)

2. Address: List current place of residence and office address(es).

Residence: 3405 Devereaux Road
Columbia, South Carolina 29205

Office: Office of the Attorney General
Rembert C. Dennis Office Building
1000 Assembly Street
Columbia, South Carolina 29201

Office
Mailing: Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

3. Date and place of birth.

October 3, 1948, Florence, South Carolina

- 4.
- Marital Status
- (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Divorced

- 5.
- Education
- : List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Law School

The National Law Center

Cameron McGowan Currie

The George Washington University
 Attended: 1972-1975
 Degree received: J.D. (with honors)
 Date degree granted: May 1975

Colleges

The Citadel
 Attended: Summers, 1970, 71 (Graduate level Education courses)
 Degree received: None (no degree sought)
 Date degree granted: Not applicable

New York University
 (Junior Semester Abroad - University of Madrid)
 Attended: Fall 1968 (courses in Spanish language and literature)
 Degree received: None (no degree sought)
 Date degree granted: Not applicable

University of South Carolina
 Attended: 1966-1970
 Degree received: B.A. Political Science
 Date degree received: January, 1970

6. Employment Record: List (by year) all business or professional corporations, companies, firms or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

February 1989 to present: Chief Deputy Attorney General, Office of the Attorney General, Director of State Grand Jury Division, Rembert C. Dennis Office Building, 1000 Assembly Street, 5th Floor, Columbia, South Carolina, 29201

September 1988 through January 1989: Cameron McGowan Currie, Attorney at Law, Sole Practitioner, Keenan Building, 1330 Lady Street, 6th Floor, Columbia, South Carolina, 29201

July 1986 through August 1988: Cameron McGowan Currie, Attorney at Law, Sole Practitioner, 1426 Richland Street, Columbia, South Carolina 29201

July 1986 to present - Member, Board of Directors, Wings, Inc., of Columbia, a non-profit corporation providing

Cameron McGowan Currie

therapeutic horseback riding to handicapped persons;
(Secretary, 1992 - present)

July 1986 - February 1989, Adjunct Professor in Trial
Advocacy, University of South Carolina School of Law,
Columbia, South Carolina

October 1984 to July 1986: United States Magistrate,
United States District Court for the District of South
Carolina, 1845 Assembly Street, Columbia, South Carolina
29201

February 1980 to October 1984: Assistant United States
Attorney, Office of the United States Attorney for the
District of South Carolina, 1100 Laurel Street, Columbia,
South Carolina. Served as Acting Chief and Chief of the
Civil Division of the U.S. Attorney's Office (1980-1983);
prosecutor and Lead Drug Task Force Attorney of the
President's Organized Crime Drug Enforcement Task Force
(1983-1984).

1978-80, Assistant United States Attorney, Office of the
United States Attorney for the District of Columbia, 555
4th Street, N.W., Washington, D.C. 20001; Civil and
Appellate Sections

1975-78 , Associate in Litigation Section, Arent, Fox,
Kintner, Plotkin & Kahn, 1050 Connecticut Avenue, N.W.,
Washington, D.C. (part-time law clerk 1974-75)

1973-74, Law Clerk, The Honorable Arthur L. Burnett,
United States Magistrate, United States District Court
for the District of Columbia, Constitution Avenue and
John Marshall Place, N.W., Washington, D.C. (part time)

1972-73, Associate Editor, SEC No Action Letters Index,
Washington Service Bureau, 655 15th Street, N.W.,
Washington, D.C. 20005 (part time)

1970-72, Government, Spanish and Economics Teacher,
Moultrie High School, Mt. Pleasant, South Carolina

7. Military Service: Have you had any military service? If so,
give particulars, including the dates, branch of service, rank
or rate, serial number and type of discharge received.

No

Cameron McGowan Currie

8. Honors or Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Order of the Coif, George Washington University Law School

Department of Justice Sustained Superior Performance Award (1980)

Service awards from:

Federal Bureau of Investigation
Drug Enforcement Administration
United States Customs Service
Internal Revenue Service
Bureau of Alcohol, Tobacco and Firearms
South Carolina Law Enforcement Division
United States Marshals Service

"av" rating, Martindale-Hubbell, Inc.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

South Carolina Bar, including the Continuing Legal Education Committee, 1986-88; and Council Member of the Criminal Law section, 1987-88; Editorial Board Member, South Carolina Lawyer magazine, 1988-present.

District of Columbia Bar.

Richland County, S. C., Bar Association.

American Bar Association, including the Litigation Section, Trial Practice Committee, Civil RICO Subcommittee and Judicial Administration Division.

South Carolina Trial Lawyers Association, including:

- ** Member, Board of Governors, 1988-91.
- ** Chairman, Officer and Board Review Committee, 1987-88.
- ** Chairman, Continuing Legal Education Committee, 1987-88.
- ** Chairman, Employment Law Section, 1988-89.

Member, Federal Judicial Council (1985-86)

Cameron McGowan Currie

National Association of Criminal Defense Lawyers (1986-1989)

South Carolina Defense Trial Attorneys Association (1986-1988)

Association of Trial Lawyers of America (1986-1989)

South Carolina Women Lawyers Association (1993 [inception] - present)

United States District Court for the District of South Carolina Criminal Justice Act Committee (1986-89)

Assistant United States Attorneys Association, District of Columbia (1978-84)

Founding Member and Master, John Belton O'Neill Chapter, American Inns of Court (Secretary - 1986-89) (Executive Committee Member - 1986-87).

Supporting Fellow, American Inns of Court Foundation

George Washington University Law Alumni Association; Member, Board of Directors (1987-89)

National Council of United States Magistrates: Member, Publications Committee (1984-1986)

Member, Merit Selection Panel, Reappointment of United States Magistrate

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

To my knowledge, the only organizations to which I belong that are active in lobbying are the South Carolina Bar, American Bar Association, South Carolina Trial Lawyers Association and the South Carolina Law Enforcement Officers Association. I am also a member of the University of South Carolina Alumni Association and Delta Delta Delta Alumni Association. I serve on the Heathwood Hall Episcopal School Professional Women's Advisory Committee and am a member of the Heathwood Hall Episcopal School Parents' Guild. I am a member of Eastminster Presbyterian Church and am a member of the Board of Directors and Secretary of Wings, Inc., of Columbia, a non-profit corporation which provides therapeutic horseback riding to handicapped persons.

Cameron McGowan Currie

11. **Court Admission:** List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

United States Supreme Court (1980 - present)

United States Court of Appeals for the Fourth Circuit (1980 - present)

United States Court of Appeals for the District of Columbia Circuit (1976 - present)

United States District Court for the District of South Carolina (1984 - present) and the District of Columbia (1976 - present)

South Carolina Supreme Court (1980 - present)

District of Columbia Court of Appeals (1975 - present)

12. **Published Writings:** List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

a. "The State Grand Jury", South Carolina Lawyer, Volume I, No. 1, July - August 1989

b. "Criminal Penalties in Perspective", South Carolina Lawyer, Volume V, No. 2, September - October 1993.

Two copies of these articles are attached.

I have served as an Editor of the South Carolina Bar magazine, South Carolina Lawyer, since 1988. In that capacity, I have edited many of the articles published in the magazine. A complete set of South Carolina Lawyer issues is available if needed.

13. **Health:** What is the present state of your health? List the date of your last physical examination.

Cameron McGowan Currie

Excellent. September 7, 1993

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

In 1984 I was appointed United States Magistrate for the District of South Carolina. This position was filled by vote of the active United States District Judges. From the time of my appointment in October 1984 until July 1986 I held this position and performed all the duties of a United States Magistrate. These duties included conducting preliminary hearings and bond hearings in criminal cases, conducting trials of federal misdemeanor violations, handling pretrial matters in civil cases, preparing reports and recommendations in social security cases, prisoner cases and employment discrimination cases, issuing search warrants and complaints in criminal cases, and performing such other duties as were assigned by United States District Judges from time to time.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or whether your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citations to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

As a United States Magistrate I generally did not issue final opinions in civil cases. I wrote reports and recommendations which then went to a United States District Judge for acceptance or rejection. Thus, I am unable to provide citations for the ten most significant opinions which I have written. I am not aware of any district court or appellate opinion where my decision was reversed or where my report was accepted or rejected with criticism of my substantive or procedural recommendations. I am not aware of any significant opinion on a federal or state constitutional issue. Attached are copies of one opinion and nine Reports and Recommendations cited below.

In Re: The Grand Limited Partnership, d/b/a Howard Johnson's Ocean Report, Civil Action No. 84-0170-15A (D. S.C. 1985)

Cameron McGowan Currie

Greer v. South Carolina Wildlife and Marine Resources Department, Civil Action No. 3:85-2561-15A (D. S.C. 1986)

Garvin v. The South Carolina House of Representatives, et al., Civil Action No. 82-3311-15 (D. S.C. 1985)

Leisure Tours Corporation, et al. v. Leisure Leads, Ltd., et al., Civil Action No. 83-1309-0 (D. S.C. 1985)

Taylor v. Department of Housing and Urban Development, Civil Action No. 3:85-248-0A (D. S.C. 1985)

Foster v. City of Columbia, South Carolina, et al., Civil Action 3:84-363-15 (D. S.C. 1985)

Fraiser v. State of South Carolina, et al., Civil Action No. 3:85-0358-15A (D. S.C. 1985)

Alley v. S. C. Dept. of Corrections, et al., Civil Action No. 3:85-2143-2A (D. S.C. 1986)

Darley v. Strom Thurmond, etc., et al., Civil Action No. d:84-2969-15A (D. S.C. 1984)

Burckhardt v. The Hilton Hotel Corporation, et al., Civil Action No. 3:85-0069-15A (D. S.C. 1985)

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

I have never held any public office. I have never been a candidate for elective public office.

17. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

Cameron McGowan Currie

During my second year in law school at George Washington University Law School I clerked on a part-time basis for United States Magistrate Arthur L. Burnett at the United States District Court for the District of Columbia. This was during the 1973-74 school year.

2. whether you practiced alone, and if so, the addresses and dates;

I practiced law alone from July 1986 through January 1989. From July 1986 through August 1988 the address of my practice was 1426 Richland Street, Columbia, South Carolina. From September 1988 through January 1989 the address of my office was 1330 Lady Street, 6th Floor, Columbia, South Carolina.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

1975-78, Associate (Litigation Section); Arent, Fox, Kintner, Plotkin & Kahn; current address 1050 Connecticut Avenue, N.W., Washington, D.C. 20036

1978-80, Assistant United States Attorney, United States Attorney's Office for the District of Columbia, current address 555 4th Street, N.W., Washington, D.C. 20001

1980-84, Assistant United States Attorney, United States Attorney's Office for the District of South Carolina, current address 1441 Main Street, Columbia, South Carolina 29201

October 1984 - July 1986, United States Magistrate, United States District Court for the District of South Carolina, 1845 Assembly Street, Columbia, South Carolina 29201

July 1986 - January 1989, sole practitioner as described in response to question 17. a. 2. above.

Cameron McGowan Currie

July 1986 - February 1989, Adjunct Professor of Trial Advocacy, University of South Carolina School of Law, Columbia, South Carolina.

February 1989 to present, Chief Deputy Attorney General and Director, State Grand Jury Division. Office of the Attorney General, 1000 Assembly Street, Columbia, South Carolina 29201.

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

Upon graduation from law school I joined the law firm of Arent, Fox, Kintner, Plotkin & Kahn in Washington, D.C. as an Associate in the Litigation Section. From August 1975 until mid 1978 I was assigned a variety of civil litigation matters, primarily in the areas of commercial, real estate and construction litigation. I tried cases as co-counsel and later as lead counsel in the courts of Arlington County, Virginia, Montgomery County, Maryland and the District of Columbia. I also appeared in the United States District Courts for the Eastern District of Virginia, the District of Columbia and the District of Rhode Island.

In 1978 I accepted employment as an Assistant United States Attorney for the District of Columbia. At the U.S. Attorney's Office, I was assigned to the Civil Division and later to the Appellate Division. During my tenure at the United States Attorney's Office I was lead counsel in all civil cases which I handled. These cases included employment discrimination cases filed against the United States, government contract litigation involving the United States and various suits against federal agencies and the President. During my tenure in the Appellate Division of the office I handled appeals before the District of Columbia Court of Appeals and the United States Court of Appeals for the District of Columbia Circuit. I was lead counsel in all appeals to which I was assigned.

Cameron McGowan Currie

In 1980 I transferred to the Office of the United States Attorney for the District of South Carolina and was assigned to the Civil Division. There, I continued to act as counsel in cases against the United States under the Federal Tort Claims Act, employment discrimination statutes, in civil rights actions brought on behalf of the United States against the State of South Carolina and the Charleston County School District, and in condemnation actions brought by the United States. In 1982 I was appointed Chief of the Civil Division. In this capacity I supervised the work of approximately ten Assistant United States Attorneys assigned throughout the state. In 1983, along with my duties as Chief of the Civil Division, I was assigned to the President's Organized Crime Drug Enforcement Task Force (OCDETF). In this assignment, I handled civil forfeiture actions brought on behalf of the United States against drug assets and prosecuted drug cases. During my tenure with OCDETF I was appointed Lead Drug Task Force Attorney. I served as either co-counsel or lead counsel on a number of major drug prosecutions during this period. I continued to do this until October 1984 when I was appointed United States Magistrate for the District of South Carolina.

My duties as United States Magistrate from October 1984 through July 1986 are set forth in response to question 14 above.

In July 1986 I entered private practice as a sole practitioner specializing in federal civil and criminal litigation. I continued in private practice until the end of January 1989 when I accepted the position of Chief Deputy Attorney General in charge of the State Grand Jury Division of the Office of the Attorney General. As a sole practitioner, I had a litigation practice in which I handled approximately 50% criminal and 50% civil cases. I represented individuals in the state and federal courts and generally received my cases as referrals from other lawyers. During this period, I handled two capital murder cases, a large number of federal criminal cases, a large number of employment discrimination cases in both federal and

Cameron McGowan Currie

state courts and a smaller number of personal injury cases.

In February 1989 I assumed my present position. I set up the State Grand Jury Division of the Office of the Attorney General and formulated procedures for the new State Grand Jury in South Carolina. During my tenure with the State Grand Jury Division I have served as lead counsel in the trials of nine major drug cases. Several of these cases have involved trials lasting 3 weeks.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

I do not believe that I can describe a typical former client. Because I specialized in litigation and operated primarily on referrals from other lawyers, I represented all types of individuals, and a number of corporations. Some of the corporations I represented were Pirelli, BankAir, Inc. and B&R Pumping. I represented physicians, attorneys, a state senator, inmates, police officers, universities, businessmen, and a variety of individuals in job-related litigation.

To the extent that I have specialized, it has been in the areas of medical malpractice defense, employment discrimination litigation (plaintiff and defense) and federal and state criminal prosecution and defense work.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each variance, giving dates.

Since graduation from law school I have appeared in court frequently. I have always been a trial lawyer except for a brief period of appellate work from October through December 1989 and when I served as United States Magistrate from October 1984 through July 1986. As a United States Magistrate I appeared in court almost daily.

2. What percentage of these appearances was in:
 - (a) federal courts. 75%

Cameron McGowan Currie

- (b) state courts of record. 20%
 - (c) other courts. 5%
3. What percentage of your litigation was
- (a) civil. 50%
 - (b) criminal. 50%
4. State the number of cases you tried to verdict or judgment (rather than settled) in courts of record, indicating whether you were sole counsel, chief counsel, or associate counsel.
- Five as sole counsel, sixteen as chief counsel, and two as associate counsel. These numbers do not include any cases tried to verdict or judgment by me as United States Magistrate.
5. What percentage of these trials was:
- (a) jury 65%
 - (b) non-jury 35%
18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:
- (a) the date of representation;
 - (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
 - (c) The individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

(See Appendix B)

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

There are a number of significant legal activities which I have pursued, including significant litigation which did not progress to verdict or judgment at trial. The most significant are:

1. As Assistant United States Attorney for the District of South Carolina, I was co-counsel for the United States in the case of United States v. State of South Carolina, a civil rights case brought to compel the South Carolina Highway Patrol to hire women as troopers. This case resulted in the entry of a Consent Decree in which the State agreed to begin hiring women.
2. When in private practice in 1987, I was appointed to represent a defendant in a capital murder case. In State of South Carolina v. Larry Donnell Williams, my client was charged with capital murder in the kidnapping, rape and murder of a three-year-old girl. Venue of the case was moved from Richland County to Spartanburg County due to excessive pretrial publicity. Following jury selection, which lasted several days, the State agreed to accept a plea to non-capital murder and my client received a 30 year sentence.
3. State of South Carolina v. Fred Singleton, 437 S.E. 2d 53 (S.C. 1993)
During the time that I was in private practice, I was appointed by the United States District Court to represent a death row inmate. I sought an evidentiary hearing on the inmate's competency to be executed. The case was remanded to the state court for a post conviction relief hearing. By Opinion filed August 30, 1993 the Supreme Court of South Carolina affirmed the key portions of the lower court's ruling, finding that the inmate was incapable of meeting even a modicum of competency. This case established the standard for assessing incompetency to be executed in South Carolina.

Cameron McGowan Currie

4. Wings, Inc. of Columbia. Since 1986 I have served as volunteer counsel and Board Member of Wings, Inc. of Columbia, a non-profit corporation which sponsors therapeutic horseback riding for handicapped persons. I have served as Secretary since 1992. I have assisted in negotiations of leases, preparation of releases and have provided other general legal advice to the Board. The current President of Wings is Susan Dugan, Professor, Benedict College, Columbia, South Carolina.
5. State Grand Jury of South Carolina. As Chief Deputy Attorney General and Director, State Grand Jury Division, I established procedures for use by the State Grand Jury Division and the State Grand Jury, a new institution of the criminal justice system in South Carolina. Our unit was picked as a model pilot project by the Department of Justice Bureau of Justice Assistance. Several other states have followed our procedures and have enacted statutes similar to ours. These include Illinois and Mississippi. In May 1993 a National Conference on State Grand Juries was held in Columbia, attended by representatives of approximately 22 states. The procedures of the State Grand Jury of South Carolina were disseminated and assistance to states wishing to establish such a system is continuing.

The matters described above, together with the cases described in Appendix B, constitute the most significant legal activities which I have personally pursued.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

State of South Carolina Employee Deferred Compensation: 401K and 457 plans through employment with State of South Carolina (401(K) will be transferred to personal IRA account with Merrill, Lynch. 457 can only be transferred to another 457 plan)

State of South Carolina; Member S.C. State Retirement System (Funds to be transferred to personal IRA account with Merrill Lynch)

Merrill, Lynch, Pierce, Fenner and Smith, Inc. IRA account (not as result of prior employment or business or professional association)

With the exception of the State of South Carolina Deferred Compensation Program and the State of South Carolina Retirement Plan, I have no anticipated receipts from deferred income arrangements, stocks, options, uncompleted contracts or other future benefits which I expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

Should a potential conflict of interest arise, it would be evaluated based on the current information and a fair, just and ethical resolution arrived at to include my disqualification from any proceedings should it be prudently and ethically indicated at that time.

Cameron McGowan Currie

Should a potential conflict arise, I intend to follow the Code of Conduct for United States Judges.

The only categories of litigation of which I am aware which could present a potential conflict of interest during my initial service would be cases in which the South Carolina Office of the Attorney General was involved during my tenure. In accordance with Canon 3C(1)(e) of the Code of Conduct for United States Judges, I would disqualify myself in any case in which I participated as counsel, advisor, or material witness or in which I have expressed or formed an opinion concerning the merits of the case. I would also disqualify myself in any case which was under my supervision as Director of the State Grand Jury Division, Office of the Attorney General, or as a supervisor at the Office of the United States Attorney for the District of South Carolina.

As to financial arrangements, I would hear no case regarding any company in which my children or I hold stock. My list of stock ownership is attached to my Financial Statement. If confirmed it is my intention to sell all publicly held stocks and invest in a widely held investment fund.

I would disqualify myself in any case in which my father's law firm is involved. The firm is McGowan, Keller, Eaton & Stewart, P.A. of Florence, South Carolina.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

I have no plans, commitments, or agreements to pursue outside employment, with or without compensation, during my service with the court. If permitted by the Code of Conduct for United States Judges and the Guidelines of the Judicial Conference I would like to continue my work with Wings, Inc., of Columbia, a non-profit corporation which sponsors therapeutic horseback riding for handicapped persons. I would also be interested in teaching at the University of South Carolina Law School and the Department of Justice Advocacy Institute.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends,

Cameron McGowan Currie

interest, gifts, rents royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

A copy of my Financial Disclosure Report as required by the Ethics in Government Act of 1989 is attached.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

Financial Statement with schedules attached.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I have never held a position in a political campaign. I did, however, serve as a volunteer during the 1986 and 1992 campaigns of United States Senator Ernest F. Hollings. In addition, I worked as a volunteer in the Clinton/Gore campaign in 1992.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

As a law student at George Washington University, I participated in the Law Students in Court Program and represented indigent persons in the District of Columbia Superior Court, Landlord-Tenant Division and Small Claims Division.

As an attorney in private practice, I represented a number of indigent persons without compensation. These included persons charged with violations of the criminal law and individuals appearing before the Family Court of the Fifth Judicial Circuit. I handled a large number of employment discrimination cases in which I received no compensation.

From 1986 to the present I have served as Member, Board of Directors, and more recently as Secretary of Wings, Inc., of Columbia, a non-profit organization which sponsors therapeutic horseback riding for handicapped persons. Many of these handicapped persons are indigent, and we provide scholarships for indigent persons to participate in the program. My activities have included legal advice, fund raising, volunteer work and have encompassed secretarial duties during the past year. I have committed over 100 hours to Wings in the past year alone.

From 1978 through 1984 and 1989 to present I have been employed by the federal and the state governments. This has restricted my ability to engage in pro bono services.

As a Den Leader of a Webelos Cub Scout Den, I engaged in community service activities such as collecting food for Harvest Hope Food Bank, a food bank which supplies food to needy and homeless persons, collecting blankets to supply to the Oliver Gospel Mission, a homeless shelter and, as a Sunday School teacher, have organized assistance for shut-ins such as delivery of meals. I have also been a volunteer for the American Heart Association, American Cancer Society and March of Dimes.

Cameron McGowan Currie

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong or have you belonged to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

No.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

No. There is no selection commission in my jurisdiction to recommend candidates for nomination to the federal courts. I wrote a letter to Senator Hollings expressing my interest in becoming a United States District Judge. A copy of my curriculum vitae was attached to the letter. In late July I was contacted a staff member of Senator Hollings who indicated that the Senator wanted to meet with me to discuss my qualifications. I met with the Senator and discussed my background, experience and qualifications. Two days later the Senator called and advised that he was sending a letter to the President recommending that I be nominated. Several weeks later I met with Senator Thurmond and discussed my background and experience. Thereafter, I received a package of forms from The White House. I completed the forms and submitted them to The White House. I was then contacted by an official of the Office of Policy Development of the Department of Justice. I was asked numerous questions concerning my background and experience. I was later investigated by the FBI. During this investigation I was interviewed by an FBI agent. In addition, I was investigated by the ABA for purposes of a rating. As part of the ABA investigation, a member of the ABA interviewed me. In October I was asked to travel to Washington for an interview at the Justice Department. There I was interviewed by Justice Department officials. We discussed my background and experience. We also discussed my reasons for wanting to become a federal judge.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The authority and jurisdiction of the federal courts are derived from Article III of the Constitution and the laws of Congress. Federal courts are courts of limited jurisdiction, and those seeking to invoke this jurisdiction must affirmatively demonstrate that the "case or controversy" (as defined by the Constitution) is

clearly within the jurisdictional competence of the federal courts.

Inherent in the constitutional meaning of these words is the restriction of federal court jurisdiction to live controversies presented in an adversary manner by real parties in interest to the "case or controversy." In entertaining jurisdiction of such issues, federal courts should confine the exercise of jurisdiction to the issues properly presented by the parties. The issue at hand should not be expanded for the expression of personal views or opinions of the judge.

As to constitutional issues raised under the "case or controversy" theory, federal courts should go no further in deciding such issues than the claims of the "case or controversy" require. The decision should be confined to the constitutional issues presented in the case by adversaries with a personal and direct connection and stake in the outcome.

In the absence of controlling precedent, a judge must base his or her decision on identifiable judicial principles and not on personal beliefs or opinions.

Cameron McGowan Currie

AFFIDAVIT

I, Cameron McGowan Currie, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

January 28, 1994

Cameron McGowan Currie
Cameron McGowan Currie

Kaye Fusaro
Kaye Fusaro
(Notary Public for the State of South
Carolina)
(My Commission Expires: October 16, 2000)

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).

Franklin Douglas Burgess

2. Address: List Current place of residence and office address(es).

Home Address: 4513 87th Ave. W., Tacoma, WA 98466

Office: 1717 Pacific Ave., Rm. 3244
Tacoma, WA 98402-3228

3. Date and place of birth.

DOB: March 9, 1935

Place of Birth: Eudora, Arkansas

- 4.
- Marital Status
- (include maiden name of wife, or husband's name).
-
- List spouse's occupation, employer's name and business address(es).

Married

October 24, 1981

Washington, D.C.

Treava Annette Whitted

Administrative Secretary

Steilacoom High School, 54 Sentinel Dr., Steilacoom, WA

- 5.
- Education
- : List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

<u>Name of School</u>	<u>Address</u>	<u>From</u>	<u>To</u>	<u>Degree</u>
Arkansas AM&N College	Pine Bluff, ARK	9/53	5/54	None/USAF
Gonzaga University	Spokane, WA	7/58	5/61	B.E. 5/61
Gonzaga Law School	Spokane, WA	9/62	5/66	J.D. 5/66

- 6.
- Employment Record
- : List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, non-profit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

<u>Year</u>	<u>Position</u>	<u>Business</u>
9/66-2/67	Legal Intern	Atomic Energy Comm. Rienland, WA

2/67-7/69	Asst. City Atty.	City of Tacoma Tacoma, WA
7/69-1/76	Partner	Tanner & Burgess Puget Sound Bank Bldg. Tacoma, WA
1971-1980	Judge Pro Tem	Municipal Court and Pierce County District Court, Tacoma, WA
1/76-1/79	Partner	Tanner, McGavick, Felker, Fleming, Burgess & Lazares Tacoma, WA
1/79-6/80	Partner	McGavick, Burgess, Heller & Foister Tacoma, WA
6/80-12/81	Regional Counsel	Dept. of Housing & Urban Development Seattle, WA
12/81-Present	U.S. Magistrate Judge	1717 Pacific Ave. Tacoma, WA 98402

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

Yes.

June 1954 to March 1958
United States Air Force
Rank: Airman Second Class
Serial No.: 18460598
Type of Discharge: Honorable

8. Honors and Awards: List any scholarships, fellowships, honorary society memberships that you believe would be of interest to the Committee.

College: Class Officer; Who's Who 1961; Captain, Varsity Basketball Team and Most Valuable Player, Basketball, 1958-1961; All Conference, Basketball, Inland Empire Athlete of the Year, 1961; KREM TV's Man of the Year, 1961; All American, Basketball, 1960-1961; Nation's leading scorer, Basketball, 1961, 32.4 average per game.

Law School: Class Officer; Student Body Representative; Class President.

Post-College: Outstanding Young Men of America, 1970; Personalities of West and Midwest, 1970; Board of Regents, Gonzaga University, 1976 to 1980; Inland Empire Hall of Fame, inducted September, 1985; NACC Balfour Silver Anniversary All American Basketball team, 1986; Gonzaga University Hall of Fame, Basketball, 1989.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Washington State Bar Association
Pierce County Bar Association - Trustee 1972
Loren Miller Bar Association
National Conference of U.S. Magistrates Judges

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

No lobbying before public bodies.

Organizations:

Tacoma Urban League
Shiloh Baptist Church
NAACP
Resource Person for Annual National Black History Month

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

All Courts of the State of Washington Sept. 27, 1966
U.S. Dist. Ct. for Western Washington June 9, 1970
U.S. Dist. Ct. for Eastern Washington Dec. 28, 1979

12. Published Writings: List the titles, publisher, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

None.

13. Health: What is the present state of your health? List the date of your last physical examination.

Good. 1989

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

December 23, 1981 - Present U.S. Magistrate Judge for Western District of Washington - Appointed.

My jurisdiction is limited and controlled by Title 28 U.S.C 636. In the criminal area (trials only, with the consent of the defendant) the extent of my authority is a misdemeanor. Civil jurisdiction is unlimited as to scope but is also predicated upon consent of the parties. Other matters, without necessity of consent, may be by Orders of Reference from the District Judge.

Early 1971 to 1980 - Judge Pro Tem - Tacoma Municipal Court and Pierce County District Court - Appointed.

These are courts of limited jurisdiction. By statute no criminal offense can exceed a misdemeanor and Civil cases for damages that do not exceed \$25,000.00.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions or federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

By the nature of the Magistrate Judge position, my output is not in the nature of "opinion", but rather reports and recommendations issued to the judges of the District Court.

Hayes v. Kincheloe, C83-350T, affirmed and reported at 784 F.2d 1434 (9th Cir. 1986). Habeas corpus petition; state prisoner had pled guilty to two counts of second degree murder. A review of the circumstances surrounding the plea indicated that the prisoner had never been properly informed of the element of intent required to support a second-degree murder conviction, and thus was not a "knowing and voluntary" plea, and incompatible with due process. Accepting my findings, the District Court granted the Petitioner's habeas petition.

Hart v. Heckler, C84-355T, reversed sub nom. Hart v. Bowen, 799 F.2d 567 (9th Cir. 1986). SSI claimant was found to have assets rendering her ineligible for benefits. The invalidating asset was the value of an installment sales contract the claimant

received in the sale of her former home, the installments for which were promptly and completely paid over as installment payments towards her new home. The Secretary noted that the installment sales contract was a "proceed" and a liquid asset with a cash value, which had not been reinvested within the three month period required by the home exclusion provided in the Regulations. While recognizing the incompatibility of the Secretary's interpretation with the overall purpose of the Social Security Act, I followed the Secretary's interpretation "with reluctance". The District Court affirmed. The Ninth Circuit, upon appeal, ruled that the Secretary's interpretation of the Regulation was unacceptable, and reversed.

Norman v. DuCharme, C85-975T, affirmed in part and reversed in part, 871 F.2d 1483 (9th Cir. 1989). State prisoner filed a habeas corpus petition arguing, inter alia, that the confession admitted to trial was inadmissible, and that he was unconstitutionally sentenced to a life term without possibility of parole. As to his confession, the petitioner argued that his Miranda waiver of rights was insufficient to waive his Sixth Amendment right to counsel, and that he made a request for counsel during police interrogation (during transport to the police station, he asked an officer whom he knew personally "whether or not he should get an attorney"). I found that a Miranda waiver, although stemming from the Fifth Amendment right to avoid self incrimination, was adequate to waive the Sixth Amendment right to counsel. I next found that the mere mention of the word "attorney" was not enough to constitute either an equivocal or unequivocal request for counsel: such a request must at the minimum express some affirmative intent to consult counsel.

However, I recommended the grant of habeas relief on the petitioner's sentencing claim. Under the then-effective state statutes, the petitioner had the right to plead guilty to the charged offense, for which he could receive no more than a life term with the possibility of parole. Thus, the sentence of life without parole was effectively reserved for those individuals who exercised their right to proceed to trial. I found that this was an unconstitutional penalization for the exercise of the right to trial.

The District Court denied habeas relief, accepting my analysis of the confession issues, but rejecting the sentencing analysis. The Ninth Circuit agreed as to the confession issues, but ruled that the petitioner's sentence was indeed unconstitutional as I had believed.

Toomey v. Clark, C86-64T, affirmed 876 F.2d 1433 (9th Cir. 1989). The petitioner sought habeas relief from a conviction for felony murder and conspiracy to commit robbery. At the time of the crime, the petitioner was 16 years old. The juvenile court declined jurisdiction, finding in part that the petitioner's pregnancy would interfere with any chance of rehabilitating the

petitioner before the juvenile system lost jurisdiction. The petitioner was tried as an adult, and out-of-court statements of her co-conspirator were admitted at her trial.

I found that the juvenile court's declination of jurisdiction was not an improper gender-based discrimination: The juvenile judge, charged inter alia with safeguarding the community, had noted in view of the short time available prior to the petitioners twenty-first birthday that the proposed treatment plan could only be successful under ideal conditions. The petitioner's pregnancy, according to the juvenile judge, could only distract from and disturb the course of her psychological treatment, and would likely defeat rehabilitation.

I further found that the petitioner's Confrontation Clause issue was without merit. The out-of-court statements made by the petitioner's co-conspirator were facially reliable, and as they were not prior testimony, unavailability of the co-conspirator was not required under United States v. Inadi, 106 S.Ct. 1121 (1986).

The District Court adopted my recommendations and denied habeas relief. The Ninth Circuit affirmed.

McDowell v. Rahm, C84-812T, affirmed sub nom. Brinkman v. Rahm, 878 F.2d 263 (9th Cir. 1989). In this class action, patients at a state mental institution challenged the institution's application of patients' social security benefits to confinement costs. This use of patients' benefits was made without notice, hearing or resort to garnishment proceedings. I found that 42 U.S.C. § 407 expressly forbade this attachment or confiscation of funds, despite contrary Fifth Circuit precedent. In the alternative, I found that the institution had not complied with the notice requirements of the Due Process Clause. The District Court agreed, and the Ninth Circuit affirmed, noting that an intervening Supreme Court case had expressly ruled that §407(a) "unambiguously ruled out any attempt to attach Social Security benefits."

Young v. State of Washington, C87-7B, reversed by the Ninth Circuit in an unpublished opinion, CA No. 87-3990 (9th Cir. August 17, 1988). A state prisoner, incarcerated on later charges, challenged a 1963 conviction (for which his term of imprisonment had been completely served) through its impact on his current sentence (more severe due to the prior conviction). Based upon precedent from the Sixth and Eighth Circuit, particularly Cotton v. Mabry, 674 F.2d 701 (8th Cir.), cert. denied, 459 U.S. 1015 (1982), which presented a procedurally indistinguishable case, I recommended that the habeas petition be denied. The District Court adopted this reasoning, but the Ninth Circuit found that the collateral consequences of the 1963 conviction satisfied the "in custody" requirement of the federal habeas statute. (See Report and Recommendation Attachment A).

Bates v. Bowen, C87-377B, reversed sub nom. Bates v. Sullivan,

894 F.2d 1059 (9th Cir. 1990); and Bunnell v. Bowen, C87-677T, reversed sub nom. Bunnell v. Sullivan, 912 F.2d 1149 (9th Cir. 1990); affirmed en banc 947 F.2d 341 (9th Cir. 1991). In both these cases, social security disability claimants had testified to experiencing disabling pain and subjective pain-related limitations. The Secretary had denied benefits, based primarily on the failure of the claimant to present evidence documenting the severity of the pain alleged. In each case, I recommended remand to the Secretary on the grounds that medical evidence had established a medical impairment that could rationally produce the degree of pain alleged: Ninth Circuit had until the Bates reversal consistently held that different individuals could have different pain thresholds. Where medical evidence established an impairment that could cause such pain, the claimant was not required to submit medical evidence fully documenting the full degree of severity of pain alleged.

However, in Bates, the Ninth Circuit panel reviewed the Secretary's regulations and held that the Secretary could indeed rely upon lack of medical evidence supporting degree of severity. Among other cases, Bunnell was likewise decided. Ultimately, the Ninth Circuit reconsidered this issue en banc, and reaffirmed the original pain standard that was the basis of my recommendations in both Bates and Bunnell.

Young v. Kenney, C87-722T, affirmed in part and reversed in part 907 F.2d 874 (9th Cir. 1989). In this case, a prisoner filed a civil rights claim requesting relief from prison officials for miscalculating his prison sentence (good time credits). Noting that the prisoner was essentially challenging the length of his sentence, I ordered the parties to brief whether exhaustion of state remedies was required. While the Ninth Circuit had not addressed this issue, other circuits had treated similar claims as being in the nature of habeas corpus because they presented problems of federal/state comity. I found that the petitioner's claims indeed necessarily challenged the legitimacy of his sentence, and recommended dismissal for failure to exhaust state remedies. The District Court adopted my reasoning. The Ninth Circuit agreed that exhaustion was required, but found that the action should have been stayed rather than dismissed, so that the Plaintiff could after exhaustion seek damages or other appropriate relief without statute of limitations problems.

United States v. Bagley, MS92-445B(W.D.Wa. July 2, 1992). The United States commenced an action to collect a defaulted student loan. The borrower challenged garnishment of her wages on the grounds that she had not received service of the default action, and further contended that she was entitled to (at least) a set-off on the debt based upon her Headstart and Vista service.

Vacation of default requires an arguably meritorious defense. The borrower was entitled to no more than a deferment of payment for her Vista service--the deferment had long lapsed. However, she presented a novel issue as to her Headstart service,

which preceded her application for student loan. She contended that she had volunteered for the Vista program upon being assured that she could cancel subsequent direct student loans based upon her service. The applicable statute (20 U.S.C. § 1087ee) is silent as to when Vista service must take place to merit loan cancellation. However, the valiant efforts of a Ninth Circuit law librarian uncovered a Notice of Proposed Rulemaking in the Federal Register dated 1975, prior to the borrower's Vista service and subsequent loan application. The Notice plainly conditions loan cancellation on service after the date of execution of the loan note. The District Court adopted my report, and denied Ms. Bagley's Motion for Vacation of Default Judgment. (See Report and Recommendation Attachment B).

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

1976-1980 Member of Board of Regents, Gonzaga University -
Appointed

1980-1981 President, Tacoma Civil Service Board - Appointed

1979 Unsuccessful candidate for the Tacoma School
Board, School District No. 10

17. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:
1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;
No.
 2. whether you practiced alone, and if so, the addresses and the dates.
No.
 3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, the nature of your connection with each.

<u>Year</u>	<u>Position</u>	<u>Business</u>
9/66-2/67	Legal Intern	Atomic Energy Comm. Richland, WA
2/67-7/69	Asst. City Atty.	City of Tacoma Tacoma, WA
7/69-1/76	Partner	Tanner & Burgess Puget Sound Bank Bldg. Tacoma, WA
1/76-1/79	Partner	Tanner, McGavick, Felker, Fleming, Burgess & Lazares Tacoma, WA
1/79-6/80	Partner	McGavick, Burgess, Heller & Foister Tacoma, WA
6/80-12/81	Regional Counsel	Dept. of Housing & Urban Development Seattle, WA
12/81-Present	U.S. Magistrate Judge	U.S. District Court 1717 Pacific Ave. Tacoma, WA

- b. 1. What has been the general character of your practice before you became a judge, dividing it into periods with dates if its character changed over the years.

General practice of law. My legal career began with the Atomic Energy Commission at Richland, Washington as a legal intern from September 1966 until February 1967. My duties there included procurement contract analysis; general work with its procurement regulations, and rendering advisory opinion.

I was employed 2 1/2 years as Assistant City Attorney for the City of Tacoma, Washington, From February 1967 until June 1968 my specific duty was that of City Prosecutor. This duty entailed the prosecution of violators of City Ordinances, which included morals cases; gambling; claims against persons, property and habitation; theft; loitering; etc. Further duties consisted of drafting of City Ordinances and other related matters, as well as teaching substantive criminal law at the police academy. From June 1968 until July 1969, I worked in a legal capacity with the Department of Public Utilities of the City of Tacoma, Washington. This duty was the civil

practice of law and included trial work that was mainly defense, but included some litigation as plaintiff; legal analysis of bid proposals; administrative hearings to serving in an advisory capacity to the Public Utilities Board.

From July 1969 to June 1980 in the general private practice of law, as a trial attorney. Most of the trials have been criminal cases and included arson, burglary, robbery, larceny, assault, drugs, rape, fraud, negligent homicide, murder charges and courts martial. Handled both plaintiff and defense work in civil matters, including drafting, construction and negotiations of contracts, constitutional law, wills and probates, domestic relations, landlord-tenant, real estate and personal injury. These constituted the rest of my practice.

2. Describe your typical former clients, and mention the areas, if any, in which you specialized.

The largest percentage of my private practice was trial practice with the bulk of it being criminal.

- c. 1. Did you appear in court regularly, occasionally or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Regularly

2. What percentage of these appearances was in:

- | | |
|--|-------------|
| a) Federal Courts | Approx. 15% |
| b) State or Local Courts of Record | Approx. 60% |
| c) Other (Municipal & District Courts) | Approx. 25% |

3. What percentage of your litigation was:

- | | |
|--------------|-------------|
| 1) Civil; | Approx. 25% |
| 2) Criminal. | Approx. 75% |

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled) in courts of record, indicating whether you were sole counsel, chief counsel, or associate counsel.

Unknown, but when practicing over 12 years ago all cases went to verdict primarily as sole counsel.

5. What percentage of these trials was:

- | | |
|----------|-------------|
| 1) Jury; | Approx. 60% |
|----------|-------------|

2) Non-Jury. Approx. 40%

18. Litigation: Describe ten of the most significant litigated matters which you personally handled and give the citations, if the cases were reported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:
- a) the date of representation;
 - b) the name of the court and the name of the judge or judges before whom the case was litigated; and,
 - c) the individual name, addresses and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Because I have been a U.S. Magistrate Judge for over 12 years, I have no files available from private practice. Therefore, I am enclosing names of attorneys as a professional reputation list. One list of those that have been before me since being on the bench and one of attorneys I practiced against when in private practice.

See Attachments #1 and #2.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

I have always been committed to pro bono work and as a former board member of the Legal Aid Society, I donated many hours to the Board in setting policy and priorities. Provided countless hours serving clients of the Legal Aid Society as an attorney providing legal advise on civil matters to those who could not afford it, but had a desperate need.

As a member and former local president of the NAACP, I had the experience of dealing with social and economic issues involving minorities. I served as an attorney, legal advisor conciliator and resource person for the Tacoma Branch on matters of race, age, job, housing discrimination and contract compliance by contractors receiving federal funds and government contracts.

As a bar examiner, I was part of a committee that wrote questions for the bar exam. As a member I wrote and graded two questions. The importance of the committee was to insure of fairly written questions to test legal analysis.

As president and board member of the Tacoma Civil Service Board, we reviewed and decided employment rights of city employees as to hiring, firing, and other job related grievances.

A past member of the Board of Directors for the National Association of Magistrate Judges for the Ninth Circuit representing the Pacific Northwest dealt with policy of the organization and membership to facilitate the advancement of its members as to value, status, and stature on a National basis; especially as to its juxtaposition to the U.S. District Judge.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial business interest.

None except for retirement plans herein listed.

JRS Retirement
ABT Utility Inc. Fund (IRA)

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

I will follow the guidelines of the Code of Judicial Conduct and recuse myself from any matter that may be a conflict of interest.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

See attached Form A.O. 10. Attachment C.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

See Attachment D.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

No.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I have been a member and represented indigent defendants through the Public Defenders Office and provided legal services to indigent clients of the Legal Aid Society. Over the years I have provided free legal services to the underprivileged through my association with the NAACP and Urban League. Presently I interact with the youth of my church and schools giving talks and serving as a role model while advocating the need and value of an education. Serve as a resource person and speaker for National Black History Month.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

I do not belong to an organization that discriminates.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which participated).

Yes. Selection Committee put in place by Senator Murray. A diversified group of lawyers, a judge and lay people - fair questions, ample time to answer.

Applications were invited -- interview by the Selection Committee -- top three candidates recommended to the Senator from which the Senator made her choice.

Once selected by Senator Murray, I completed forms for the FBI and ABA and was subsequently interviewed by the Department of Justice, FBI and the ABA.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Judges are to decide justiciable issues by applying the law as established by the Constitution and precedent to the facts. Legislators pass the law and Judges enforce same or declare them unenforceable or inapplicable to the controversy at hand, but not to legislate.

FINANCIAL STATEMENT

NET WORTH

ATTACHMENT D

Provide a complete, current financial net worth statement which itemizes in detail all assets (including accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate member your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	91,000 00	Notes payable to banks—secured	-0-
U.S. Government securities—add schedule	-0-	Notes payable to banks—unsecured	-0-
Listed securities—add schedule	-0-	Notes payable to relatives	-0-
Unlisted securities—add schedule	-0-	Notes payable to others	-0-
Accounts and notes receivable:		Accounts and bills due	8,000 00
Due from relatives and friends	-0-	Unpaid income tax	-0-
Due from others	-0-	Other unpaid tax and interest	
Doubtful	-0-	Real estate mortgages payable—add schedule	75,000 00
Real estate owned—add schedule	130,000 00	Chattel mortgages and other liens payable	1,500 00
Real estate mortgages receivable	-0-	Other debts—itemize:	
Autos and other personal property	80,000 00		
Cash value—life insurance	300 00		
Other assets—itemize:			
Term Life Insurance	780,000 00		
IRA	20,000 00		
Lien on Divorce Property	20,000 00		
Total assets	1,121,300 00	Total liabilities	84,500 00
		Net worth	1,036,800 00
		Total liabilities and net worth	1,121,300 00
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, co-maker or guarantor	No	Are any assets pledged? (Add schedule.)	No
On leases or contracts	No	Are you defendant in any suits or legal actions?	No
Legal Claims	No	Have you ever taken bankruptcy?	No
Provision for Federal Income Tax	No		
Other special debt	No		

UNITED STATES SENATE
QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name: (include any former name used.)

Michael James Davis

2. Address: List current place of residence and office address.

Home: 3252 Holmes Avenue South, Minneapolis, MN 55408

Business: C-1756 Government Center, 300 South Sixth St.
Minneapolis, MN 55487

3. Date and place of birth:

July 21, 1947, Cincinnati, OH

4. Marital Status: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address.

Married: Sara Emilie Wahl (maiden and present name)

Senior Assistant Hennepin County Attorney-Civil Division
Hennepin County Attorney's Office

A-2000 Government Center
300 South Sixth Street
Minneapolis, MN 55487

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Macalester College, St. Paul, MN

B.A. 1969, Political Science, Economics
September 1965-June 1969

University of Minnesota Law School, Minneapolis, MN
J.D. 1972, September 1969-July 1972

6. **Employment Record:** List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

1970: Democratic National Committee, Watergate,
Washington D.C.
Summer Volunteer Intern

October-December 1970: Yellow Cab Co., Mpls, MN
Cab Driver

1971-1973: Legal Rights Center, Inc.
Law Clerk

1973: U.S. Department of Health, Education and
Welfare, Social Security Administration,
Baltimore, MD
Office of the General Counsel - Litigation
Division

1974: Neighborhood Justice Center, Inc.
Criminal Defense Lawyer

September - December 1974: Antioch Minneapolis
Community College
Constitutional Law Instructor

1975-1978: Legal Rights Center, Inc.
Criminal Defense Lawyer

1977: National Lawyer's Guild
Criminal Defense Trial Practice Instructor

1977-1981: William Mitchell College of Law
Trial Practice Instructor

1977-1982: Minneapolis Civil Rights Commission
Attorney Commissioner

1978-1983: Hennepin County Public Defender's Office
Criminal Defense Lawyer

1980: Intrepid Traveler
President

1982-Present: University of Minnesota Law School
Adjunct Professor

1983-1984: Hennepin County Municipal Court
Fourth Judicial District
Judge

1983-1989: Reid Townhome Properties
Limited Partner

1984-Present: Hennepin County District Court
Fourth Judicial District
Judge

April 1989, 1991 and 1993: Robins, Kaplan, Miller &
Ciresi, Trial Practice Instructor

Fall 1990: Hubert H. Humphrey School of Public Affairs
Adjunct Professor: Administrative Law Course

June 1991 and 1992: Bemidji Trial Advocacy Course
Faculty Member: Trial Practice Instructor

1991: Try Us Meyerhoff Fund
Board of Directors

Fall 1991 and Spring 1992: FBI Academy, Quantico, VA
Lecturer: Forensic DNA Technology and the
Courtroom

April and May 1993: Minnesota Advocacy Institute
Trial Practice Instructor

From 1990 to the present, have lectured at continuing
legal education courses for Minnesota Continuing Legal
Education and the Minnesota Institute of Legal Education
on various topics.

7. **Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge.**

None

8. **Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.**

The Macalester College Outstanding Alumni Award, 1989
WCCO Radio Good Neighbor Award, 1989 - for reduction of
the criminal caseload backlog in Hennepin County

9. **Bar Associations:** List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Minneapolis Civil Rights Commission, 1977-1982
 ACTLM Douglas K. Amdahl American Inns of Court
 Master and Head of Pupillage Group, 1992 - Present
 Minnesota Minority Lawyers Association, 1980 - Present
 National Bar Association, 1990 - Present
 Hennepin County Bar Association, 1986
 Minnesota State Bar Association, 1986
 Minnesota Lawyers International Human Rights Committee,
 1983-85
 Past Member of Board of Directors, 1984
 Minnesota Supreme Court Racial Bias Task Force,
 Co-Chair, Criminal Process Committee, 1/90 - 6/93
 Chair, Editorial Committee, 1/90 - 6/93
 Member, Executive Committee, 1/90 - 6/93
 Member, Data Collection Committee, 1/90 - 6/93
 Minnesota Supreme Court Closed-Circuit Television
 Task Force, 8/91 - 12/91
 Chair, Standards and Criteria Committee, 8/91 -
 12/91
 Attorney General's Task Force on the Prevention of Sexual
 Violence Against Women, 1988-1989
 Hennepin County District Court, Fourth Judicial District
 Executive Committee, 1984-89
 Civil Committee, 1984-Present
 Criminal Committee, 1984-Present
 Criminal Justice Task Force, 1988-89
 Equal Justice Committee, 1990-Present

10. **Other Memberships:** List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

No current memberships.

11. **Court Admissions:** List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

United States Supreme Court - August 15, 1980
 Eighth Circuit Court of Appeals - January 1, 1983
 Minnesota Federal District Court - March 16, 1978
 State of Minnesota - April 22, 1974

12. **Published Writings:** List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Scientific Evidence in Trial: DNA Identification Testing and its Admissibility.

November 1990

Modern Crime Detection Techniques: Forensic DNA Identification Testing.

March 1991

Bench Trials: Attorney Demeanor and Decorum.

1992

Minnesota Supreme Court Task Force on Closed Circuit Television: Minority Report adopted by the Minnesota Supreme Court. November 1991.

Minnesota Supreme Court Task Force on Racial Bias in the Courts. Editorial Chair, 1990-1993.

Strategies and Techniques: Court's Role in Promoting Settlement.

June 1993

What the Trial Judge Wants and Expects.

December 1993

13. **Health:** What is the present state of your health? List the date of your last physical examination.

Excellent.

December 10, 1992.

14. **Judicial Office:** State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

February 9, 1983-1984 Appointed Judge, Hennepin County Municipal Court, Fourth Judicial District

Presided as a limited jurisdiction trial judge over the following types of cases:

Civil actions: Cases in which amount in controversy does not exceed \$15,000 exclusive of interest and costs.

Housing: Cases involving recovery of deposit on rental property, forcible entry and unlawful detainer, and code violations of property located within Hennepin County.

Criminal Cases: Misdemeanors and gross misdemeanors committed in Hennepin County, violations of ordinances, charter provisions, rule or regulation of any subdivision of government in Hennepin County or the Minneapolis-St. Paul metropolitan airports commission.

March 1984-Present Judge, Hennepin County District Court, Fourth Judicial District. Appointed in 1984, Re-elected 1986; 1992.

Preside as a general jurisdiction trial judge over all civil and criminal cases. Family Court judge from July 1991 to December 1992.

15. Citations: If you are or have been a judge, provide:
 (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Part 1

1. David L. Anderson v. Susan Perry, Hennepin County District Court File No. 84-14894
 Court Trial
 Court's Findings of Fact, Conclusions of Law and Order for Judgment.
2. Atlanta National League Baseball Club, Inc. et. al. v. John H. Crowther, Inc. et. al., Hennepin County District Court File No. 84-01690

3. Karen Herbst v. Northern States Power Company, Hennepin County District Court File No. 803445 Court Trial - Court's Findings of Fact, Conclusions of Law and Order for Judgment appealed. Karen Herbst v. Northern States Power Company, 432 N.W.2d 463 (Minn. Ct. App. 1988).
4. State v. Thomas Schwartz, Hennepin County District Court File No. 97549-1 447 N.W.2d 422 (Minn. 1989).
5. Brian Pletan and Pamela Pletan v. Kevin J. Gaines, et. al., Hennepin County District Court File No. 87-18970 Orders dated Oct. 23, 1989, March 19, 1991. 460 N.W.2d 74 (Minn. Ct. App. 1990). 481 N.W.2d 566 (Minn. Ct. App. 1992). 494 N.W.2d 38 (Minn. 1992).
6. State v. Larry Lee Jobe, Hennepin County District Court File No. 88903565 486 N.W.2d 407 (Minn. 1992).
7. Admiral Merchants Motor Freight, Inc. and Leamington Co. v. O'Connor and Hannan and Kirkland and Ellis, Hennepin County District Court File No. 89-17317 494 N.W.2d 261 (Minn. 1992).
8. Dale Kryzer v. Champlin American Legion No. 600, Hennepin County District Court File No. 90-23121 481 N.W.2d 98 (Minn. Ct. App. 1992). 494 N.W.2d 35 (Minn. 1992).
9. Minneapolis Teachers Retirement Fund Assoc. et. al. v. State of Minnesota, Hennepin County District Court File No. 91-200 490 N.W.2d 124 (Minn. Ct. App. 1992).
10. Mark Collins v. Holly-Ann Collins, Hennepin County District Court File No. DC-159283

Part 2

Peter Braegelmann, et. al., v. Horizon Development Company, v. Bernard L. Dalsin Company, 371 N.W.2d 644 (Minn. Ct. App. 1985). Reversed: 2-1.

The trial court granted summary judgment in favor of Horizon Development Co., holding that

Dalsin Company was obligated to indemnify Horizon for all damages under the terms of an indemnification contract irrespective of Horizon's contributory negligence. The court based its decision on the indemnification agreement's language: "regardless of whether it is caused in part by a party indemnified hereunder."

The court of appeals held that indemnification provisions are strictly construed against the party seeking indemnification, and the language of this agreement failed the strict construction test. The Chief Judge wrote a dissenting opinion upholding the trial court's decision.

Harold Leach v. Curtis of Iowa, Inc. v. Barry Sather, individually and d/b/a Crystal Trucking Co. and/or d/b/a Barry Sather Truck Service, 399 N.W.2d 656 (Minn. Ct. App. 1987). Reversed.

Defendant is a trucking company whose principal place of business is Iowa. There was deposition testimony establishing defendant's business included hauling between Minnesota and California. The trial court ruled defendants had sufficient contacts with Minnesota to establish personal jurisdiction.

The court of appeals reversed stating that the only connection between defendants and Minnesota is that some of defendant's drivers were residents of Minnesota. There was no evidence that any loads were hauled inside Minnesota. The only contact with Minnesota, therefore, was with its residents, not the state itself.

Guillaume & Associates, Inc. v. Don-John Company, 371 N.W.2d 15 (Minn. Ct. App. 1985). Vacated.

In an action seeking a mechanic's lien and a money judgment, trial court entered default judgment against defendant where defendant did not answer complaint two and one-half years after the complaint was served. Trial court also denied defendant's motion to vacate judgment.

The court of appeals based its reversal on the trial court's failure to balance the weakness of Don-John Company's excuse for failing to file a timely answer against the likelihood of a meritorious defense, Don-John's diligence after learning of default judgment and the lack of prejudice to respondent.

Carlson, Poston & Associates, Ltd. v. Doshan, Lord & Bremseth, No. CX-92-657 (Minn. Ct. App. October 13, 1992). Reversed.

A jury awarded plaintiffs \$1,900 on their claims. Two months later, plaintiffs moved for attorney's fees arguing defendant asserted counterclaims unsupported by any evidence at trial, costing plaintiffs needless attorney's fees. The trial court granted plaintiffs \$3,500 in attorney's fees.

The court of appeals reversed the trial court's grant of \$3,500 in bad faith attorney's fees. The court concluded that evidence existed to support appellant's contentions. The fact that appellant's claims survived a motion for summary judgment established its claims had some merit.

Allen D. Fossum, et.al. v. Kraus-Anderson Construction Company v. Egan & Sons Air Conditioning Co., 372 N.W.2d 415 (Minn. Ct. App. 1985). Reversed.

The trial court determined that a general contractor is entitled to indemnity from a subcontractor when the general contractor's negligence causes injury to an employee which does not occur during the performance of the work provided for in the subcontract. Trial court relied on Turner Construction Co. v. The Belmont Iron Works, 158 F.Supp. 309 (E.D. Pa. 1957).

The court of appeals reversed the trial court's determination by factually distinguishing Turner from the case at issue.

Deborah Geske v. State Farm Mutual Automobile Insurance Company, No. C3-89-1588 (Minn. Ct. App. February 13, 1990). Reversed and remanded.

A car accident gave rise to this personal injury suit. Appellant was a passenger injured in a car driven by her husband. State Farm insured appellant's vehicle. Appellant signed a settlement agreement releasing her husband and "their principals, agents, and representatives" from "any and all claims." The trial court found State Farm was appellant's husband's principal and agent and released both from liability and State Farm's no-fault obligations.

The court of appeals reversed the trial court's decision holding that the release applied to liability claims, and that, without reference to statutory no-fault benefits, the agreement does not release the insurance company from providing such benefits.

In re the Marriage of Patricia Ellen Minge v. Keith Milton Minge, No. C4-92-1240 (Minn. Ct. App. December 29, 1992). Reversed and remanded.

The trial court found no substantial change in circumstances and, therefore, denied Mr. Minge any reduction in his spousal maintenance obligation. Originally, Mrs. Minge was awarded permanent maintenance in the Judgment and Decree. In December 1990, Mr. Minge moved for a reduction in spousal maintenance due to his ill health. The motion was denied in 1991, and Mr. Minge did not appeal. In 1992, Mr. Minge again brought a motion to modify maintenance. The court denied Mr. Minge's motion because his cardiologist stated that Mr. Minge's health had not changed since the last motion.

Although the court of appeals found that Mr. Minge's health was unchanged since the 1991 denial of modification, the court reversed. The appellate court based its reversal on Mr. Minge's altered employment status. Documentation showed that he could no longer work as a salesman - the job he held when maintenance was originally set.

Northwest Publications, Inc. v City of Bloomington, No. C1-88-493 (Minn. Ct. App. March 4, 1988). Reversed.

Trial court permitted the City of Bloomington to exclude Northwest Publications from a joint meeting. The purposes of the meeting were to discuss legal theories and strategies to be employed in upcoming eminent domain proceedings and to permit two parties to the development contract to discuss the status of that contract and the nature of the amendments that would be sought.

No party challenged that portion of the meeting that involved discussion of legal theories, but the appellate court reversed the trial court decision to close the meeting holding that given the second purpose of the meeting, to discuss modifications to development contracts, closure violated the Open Meeting law, Minn.Stat. §471.705, subd. 1 (1986).

Sandra Speckel v. Laurri Perkins et. al. v. Beverly Speckel, 364 N.W.2d 890 (Minn. Ct. App. 1985). Reversed.

Trial court compelled performance of a settlement agreement which appeared in a pretrial settlement negotiation letter. Counsel for defendant claimed the letter erroneously listed a \$50,000 settlement amount. He intended to offer \$15,000, but his secretary typed \$50,000. Counsel for defendant argued the \$50,000 offer was inconsistent with his statement in the letter that he did not believe this was a "limits case." The trial court found that the letter was an unequivocal offer of settlement, and that conclusion was bolstered by defense counsel's failure to inform the trial court that the matter had not been settled even after receiving notice, on three occasions, that trial date was stricken. The trial court also found defense counsel's statement that he did not believe the case was a "limits case" was merely counsel's personal belief.

The court of appeals held the letter did not constitute a valid offer of settlement as such letter was internally inconsistent.

Casanova Beverage Co., Inc. v. Commissioner of Public Safety, 486 N.W.2d 448 (Minn. Ct. App. 1992). Reversed.

Trial court interpreted Minnesota's liquor control law as requiring the sale of liquor to a wholesaler even though that wholesaler intended to ship the liquor to another state for sale in that state.

The court of appeals reversed the trial court's decision, finding the liquor control law does not require manufacturers and importers to sell liquor to a distributor if that liquor is intended for shipment to and sale in another state. The intent of the law is to promote competition and lower prices in Minnesota.

Christian Tyroll v. Private Label Chemicals, Inc. and Central Machine Works et. al., 493 N.W.2d 128 (Minn. Ct. App. 1992) aff'd in part, rev'd in part, 504 N.W.2d 54 (Minn. 1993). Reversed and remanded.

The trial court granted Central Machine Works motion for a court trial and determined the measure of damages would be the total amount of compensation benefits paid or payable.

The court of appeals held that, where an underlying cause of action is a common law negligence action, a third party tortfeasor is entitled to a jury trial in a subrogation action by an employer to determine the nature, extent, and causation of an injured employee's damages. As to damages, the court of appeals held that a third-party tortfeasor is entitled to a factual determination on the extent, causation and nature of damages even where there is no claim of unreasonableness.

The supreme court affirmed the court of appeals ruling regarding the right to a jury trial. On the damages issue, however, the supreme court reversed the court of appeals and held that damages are limited to recovery of common-law damages for past and future wage loss, loss of earning capacity, and any similar items of damage. If the tort damages exceed the compensation benefits paid and payable, the excess is moot, and if less, the employer's ultimate recovery is less by that amount.

Washington Fed. Sav. and Loan Ass'n of Stillwater v. Thomas W. Baker, et. al., and First Plymouth Nat'l Bank, 374 N.W.2d 786 (Minn. Ct. App. 1985). Reversed.

Baker sought a federally insured property improvement loan from plaintiffs. Plaintiffs approved the loan; \$10,000 at 12% interest. Baker defaulted and plaintiff sought the balance owing from HUD. Baker contended the loan was usurious as it did not qualify under Minn.Stat. \$47.20. The trial court found the loan was usurious and thereby void.

The court of appeals reversed finding there was evidence the transaction was entered into in good faith, not to evade the usury law.

State v. Orlando Clark, 486 N.W.2d 166 (Minn. Ct. App. 1992). Affirmed in part, reversed in part.

The defendant was convicted of third degree burglary, fleeing a police officer, driving under the influence and driving with blood alcohol concentration of .10 or more. The trial court sentenced defendant on all counts; sentences for driving under the influence and driving with a blood alcohol concentration of .10 or more to run concurrent with the burglary charge, while the sentence for fleeing a police officer was to run

consecutive to the burglary.

The court of appeals found the trial court committed error in sentencing defendant for both fleeing a police officer and driving with a blood alcohol concentration of .10 or more as the crimes arose out of the same behavioral incident. The sentence for the alcohol charge was vacated. As that sentence ran concurrent to the other charges, the duration of defendant's sentence did not change.

State v. Michael Leo Frank, 416 N.W.2d 744 (Minn. Ct. App. 1987). Affirmed in part, reversed in part.

Defendants Michael Allen Franson and Lonny Roger Strommen met the victim, a juvenile female, at a party on August 5, 1986. The victim agreed to leave the party with the two defendants and met the third defendant, Michael Leo Frank, at a vehicle outside of the party. The victim agreed to get into the car. After she was inside the car, defendant Strommen started the car and began to drive away. At that time, the victim protested and tried to escape. She was forced to remain inside the car, pulled into the back seat, and was brutally physically and sexually assaulted by all three defendants. After two hours, the victim was abandoned, naked, in a cornfield. Eventually she came upon a farmhouse where she received assistance from the resident and local police.

Defendant Frank challenged his 162 month sentence for kidnapping, second degree assault and first degree criminal sexual conduct.

The court of appeals vacated the sentence imposed by the trial court for assault. Because the defendant was sentenced for criminal sexual conduct, and the assault conviction arose out of the same behavioral incident, multiple sentences were in error. The effect of the court of appeals' ruling did change the duration of defendant's sentence, as all charges were sentenced concurrently.

State v. Samuel Kenneth Willis, 376 N.W.2d 427 (Minn. 1985). Affirmed in part, reversed in part.

The defendant was convicted of murder in the second degree and assault in the second degree. Immediately after the above offenses occurred, the defendant fled to Illinois. He was arrested on an unrelated charge in Illinois in November 1982. He

did not post bail, therefore he remained in custody. On December 20, 1982 a complaint was filed charging defendant with the murder in Minnesota. Minnesota requested that defendant be extradited, but defendant remained in Illinois pending disposition of the Illinois charge. On December 28, 1983, defendant was acquitted on the Illinois charges and extradited to Minnesota on January 18, 1984. At the sentencing of defendant in Minnesota, the trial court did not give defendant credit for jail time served in Illinois as it was unclear whether any of that time was in connection to the Minnesota charges.

The supreme court held that defendant was entitled to twenty-one days credit finding that the jail time spent from the date of his acquittal on the Illinois charges to the date he was finally extradited to Minnesota was connected to the Minnesota charges.

State v. Thomas Robert Schwartz, 447 N.W.2d 422 (Minn. 1989). Certified questions answered, reversed in part.

Defendant Thomas Schwartz, was indicted by a Hennepin County grand jury for murder in the first degree arising out of the stabbing death of Carrie Coonrod on May 27, 1988 in Minneapolis, Minnesota. The police obtained a pair of blood-stained blue jeans from defendant's residence and a blood-stained shirt belonging to defendant was found in the vicinity of the murder.

The Minnesota Bureau of Criminal Apprehension (BCA) performed blood group testing on the jeans, shirt and blood samples taken from defendant and Coonrod. The tests confirmed that the blood on the jeans and shirt were consistent with Coonrod's blood. The state also sent the samples for DNA testing to Cellmark Diagnostics Corporation, a laboratory licensed in Maryland and Pennsylvania, that supported the BCA's findings.

After granting the state's motion to admit evidence of DNA testing, the Hennepin County District Court certified three questions to the Minnesota Court of Appeals, which in turn certified the questions to the Supreme Court of Minnesota:

1. In determining the admissibility of emerging scientific testing, is a trial court to rely on the Frye standard of general acceptability in the scientific community or the relevancy approach derived from Rules of Evidence 403

and 702?

2. May evidence of "DNA Fingerprinting" test results be admissible in a criminal proceeding?
3. In determining the extent of admissibility of scientific test results, is a trial court to rely on State v. Joon Kyu Kim, 398 N.W.2d 544 (Minn. 1987)?

The Supreme Court of the State of Minnesota issued the following answers to the certified questions:

1. The admissibility of emerging scientific evidence is governed by the Frye standard which is interpreted to require that such evidence be generally accepted as reliable in its particular scientific field.
2. Because forensic DNA typing has gained general acceptance in the scientific community, DNA test results are admissible if performed in accordance with appropriate laboratory standards and controls. In order to ensure a fair trial, the test data and methodology must be available for independent review by the opposing party.
3. The admissibility of probability evidence is limited by the standard set forth in Joon Kyu Kim which protects against the danger of such evidence having a potentially exaggerated impact on the trier of fact.

Having answered the certified questions accordingly, the supreme court held that Cellmark did not comport with the guidelines. Their test results, therefore, lacked foundational adequacy and were inadmissible.

Admiral Merchants Motor Freight, Inc. et. al. v. O'Connor & Hannan, and Kirkland & Ellis, 494 N.W.2d 261 (Minn. 1992). Affirmed in part, reversed in part and remanded.

Appeal from an order for summary judgment in favor of defendants in a legal malpractice action. Trial court found plaintiffs failed to establish: i) an attorney/client relationship; ii) negligence of Kirkland & Ellis, but that jury issues remained

regarding O'Connor & Hannan's negligence; iii) proximate cause for any damages on any claims; and iv) that but for the alleged negligence of defendants, the plaintiffs would have prevailed in the underlying dispute.

The Minnesota Supreme Court determined there were material fact issues in dispute as to whether an attorney/client relationship existed between plaintiff Leamington and defendants and whether defendants were negligent in not preserving plaintiff's right to arbitration. This issue was reversed and remanded to the trial court to determine whether legal malpractice was committed.

The Minnesota Supreme Court affirmed the trial court's denial of plaintiff's motion to amend their complaint to add punitive and treble damages.

Joan Graffius et. al. v. Control Data Corp., 447 N.W.2d 215 (Minn. Ct. App. 1989). Affirmed in part, reversed in part.

This case involved gender and age discrimination. The trial court found plaintiff had been discriminated against on the basis of gender and age, and found that plaintiff's husband had a cause of action for loss of consortium under Minn.Stat. § 363.01-.05 (1988).

The court of appeals reversed the trial court's decision regarding plaintiff's husband. The supreme court found that the general purpose of the Minnesota Human Rights Act, Minn.Stat. § 363.01-.15 (1988) is to place an individual who has suffered discrimination in the same position he or she would be in had no discrimination occurred. The general purpose of the Act would not be enhanced by recognizing a cause of action for loss of consortium.

In re the Marriage of Hardin E. Olson v. Susan G. Olson, No. C9-92-830 (Minn. Ct. App. January 12, 1993). Affirmed in part, reversed in part and remanded.

From a review of a postdecree order, the court of appeals held that the trial court had authority to order Mr. Olson to reimburse Mrs. Olson for taxes and penalties she incurred because of early withdrawals from her IRA account. The reimbursement award must be limited, however, to taxes and penalties attributable to withdrawal of an amount equal to the maintenance arrearages. The matter was remanded to recalculate the

reimbursement award.

William Fredrick, et. al. v. Richard Pogin, et. al., No. C9-90-2251 (Minn. Ct. App. April 9, 1991). Affirmed in part, reversed in part and remanded.

Trial court correctly determined contract for deed and guaranty were two separate agreements and that cancellation of contract for deed did not effectuate cancellation of guaranty. Matter remanded, however, as a fact issue existed as to whether the guaranty covered unpaid real estate taxes.

Karen Herbst v. The Home Ins. Co. v. Northern States Power Co. v. Brown and Cris, Inc., 432 N.W.2d 463 (Minn. Ct. App. 1988). Affirmed in part, reversed in part and remanded.

After a jury awarded plaintiff approximately \$2.5 million in damages for injuries that arose from a gas pipeline explosion at a construction site, the trial court amended the damage award to \$1.8 million. NSP appealed the trial court's liability and damage determinations and plaintiff sought review of prejudgment interest award and reduction of future damages to present value.

The court of appeals upheld the trial court's liability determination but held that the record did not support the award of punitive damages and remanded the issue of prejudgment interest on compensatory damages and the issue of future damages for recalculation consistent with Minn.Stat. § 604.07 (1986).

Karen Herbst v. Home Ins. Co. v. Northern States Power Company v. Brown and Cris, Inc. No. C2-89-2134 (Minn. Ct. App. May 22, 1990). Affirmed in part, reversed in part and remanded.

After remand, NSP appealed the trial court's denial of Judgment Notwithstanding the Verdict or a new trial following court's recalculation of future damages award.

The court of appeals affirmed the trial court's decision denying JNOV or a new trial, but again remanded the issue of future damages for recalculation directing the court to apply procedures applicable prior to the discount statute.

O'Brien Entertainment Agency, Inc. v. Mike Wolfgramm, et. al. v. Good Music Agency, Inc., 407 N.W.2d 463 (Minn. Ct. App. 1987). Affirmed in part, reversed in part and remanded.

The trial court granted summary judgment against O'Brien Entertainment Agency, Inc. and certain independent contractors associated with the booking agency who sought damages resulting from an alleged breach of a personal services contract between O'Brien and the "Jets", a family musical group.

The court of appeals affirmed summary judgment awards in favor of Vake Wolfgramm, the Wolfgramm children and Donald Powell. It reversed, however, the lower court's grant of summary judgment in favor of Michael Wolfgramm stating that material facts existed regarding his understanding of the terms and implications of the contract relating to his personal liability.

Brian Pletan and Pamela Pletan v. Kevin J. Gaines et. al. and Boyd Barret, et. al. and Allstate Ins. Co., 460 N.W.2d 74 (Minn. Ct. App. 1990). Reversed and remanded.

The court of appeals reversed the trial court's determination that a municipality is entitled to discretionary function immunity from a lawsuit challenging a police officer's decision to conduct a high-speed chase of a fleeing suspect. The appellate court held that the challenged decision was not a policymaking decision, rather, implementation of a policy. The matter was remanded to the trial court.

After remand, the trial court again granted municipality summary judgment. The trial court's grant of summary judgment on this occasion was based upon the court's finding the police officer and municipality are entitled to official immunity, rather than discretionary function immunity. The trial court's decision was affirmed by the Minnesota Court of Appeals in Pletan v. Gaines et. al., 481 N.W.2d 566 (Minn. Ct. App. 1992) and the Minnesota Supreme Court in Pletan v. Gaines et. al., 494 N.W.2d 38 (Minn. 1992).

Bonnie J. Stubbs v. North Memorial Medical Center et. al., 448 N.W.2d 78 (Minn. Ct. App. 1989). Affirmed in part, reversed in part and remanded.

In a case arising from an unauthorized publication of "before" and "after" photographs of appellant's cosmetic surgery, the trial court granted summary judgment in favor of Dr. Hubble on all of plaintiff's claims. The trial court's determination was based upon its finding that Minnesota did not recognize causes of action for invasion of privacy, tortious breach of physician/client relationship and breach of implied contracts. The trial court also found that plaintiff failed to establish a prima facie case of intentional infliction of emotional distress because plaintiff's alleged distress did not meet the necessary standard of severity.

The court of appeals reversed the trial court's ruling only as to the implied contract, finding Minnesota does recognize such a cause of action. Even though Minnesota had not, as yet, specifically recognized an implied contract can exist between a patient and doctor, the court of appeals held that there was no reason a contract could not be found on the facts of this case.

Eunice K. Vinkemeier v. Intermediate District 287, Hennepin Technical Centers, No. C7-89-2064, (Minn. Ct. App. July 10, 1990). Affirmed in part, vacated in part.

The trial court found that defendants violated the Minnesota Human Rights Act, Minn.Stat. § 363.03, Subd. 1 and the Equal Pay for Equal Work Law, Minn. Stat. § 181.67. The trial court also awarded damages for mental anguish.

The court of appeals vacated the award of damages for mental anguish finding such award was not supported by the evidence.

In re the Marriage of Carol Ann Dunn v. Ronald James Dunn, No. CX-92-2201 (Minn. Ct. App. June 1, 1993). Affirmed in part, reversed in part and remanded.

In this dissolution case, the trial court granted Petitioner \$7,000 in attorney's fees. In doing so, it cited conduct that contributed to the length of the proceeding.

The court of appeals reversed and remanded the issue of attorney's fees because appellant had

already been sanctioned for the same behavior in prior orders. Additionally, the court of appeals expressed concern over the disparity in income and assets of the parties. The trial court is now directed to make findings to justify the award for attorney's fees.

In re the Marriage of Loretta H. Agee v. Andrew R. Agee, No. CX-92-2294 (Minn. Ct. App. August 3, 1993). Affirmed in part, reversed in part and remanded.

In this marital dissolution case, the trial court ordered that marital debts be determined as of March 1990 and apportioned accordingly.

The court of appeals remanded the issue of debt apportionment. The trial court listed as a marital debt certain debts incurred after March 1990. Additionally the trial court failed to specifically address certain debts that were incurred as of March 1990.

Richard Paul LeClair v. Commissioner of Pub. Safety, 416 N.W.2d 209 (Minn. Ct. App. 1987). Reversed.

Relying on Godderz v. Commissioner of Public Safety, 369 v. 606 (Minn. Ct. App. 1985), the trial court rescinded the revocation of LeClair's driver's license. The trial court found that the amended notice and order of revocation did not adequately apprise respondent of his rights. The Commissioner appealed the trial court's decision.

The court of appeals found the facts in Godderz distinguishable from the case at issue and held that the notice and order of revocation did not fall within the definition of "judicial admission." The court of appeals also found that respondent received adequate notice of administrative and judicial review in the first notice sent.

Ronald Bruce Larson v. Commissioner of Pub. Safety, 405 N.W.2d 402 (Minn. Ct. App. 1987). Reversed.

The trial court reinstated respondent's driving privileges because respondent was a member of the United States Air Force Reserves for twenty years, he was acquitted of gross misdemeanor charges of DWI and driving while over .10, he no longer uses alcohol and has responsibly demonstrated an ability to make decisions in

difficult situations. The Commissioner appealed the trial court's reinstatement.

The court of appeals reversed the trial court's decision. It held that Larson made no showing, and the trial court made no finding, that he had met the rehabilitation requirements set forth in Minn.Stat. §171.19 (1986).

Part 3

1. Andrew Ellis v. City of Minneapolis et. al., Hennepin County District Court No. 85-8179 410 N.W.2d 77 (Minn. Ct. App. 1987).
2. In re the Marriage of Barbara B. Lund and Russell T. Lund and Star Tribune, Hennepin County District Court No. DW-160029 (September 4, 1992), pet. for rev. denied, No. C3-92-1715 (Minn. Ct. App. September 14, 1992), pet. for further rev. denied, (Minn. September 15, 1992), application for stay denied, (U.S. September 22, 1992).
3. Minneapolis Teachers Retirement Fund Association et. al. v. State of Minnesota Hennepin County District Court No. 91-200 (November 12, 1991). 490 N.W.2d 124 (Minn. Ct. App. 1992).
4. James Peterson v. City of Minneapolis, Hennepin County District Court No. 86-14296, No. C3-90-429 (Minn. Ct. App. October 30, 1990).
5. Christian Tyroll v. Private Label Chemicals, Inc. and Central Machine Works et. al., Hennepin County District Court No. 89-07134 493 N.W.2d 128 (Minn. Ct. App. 1992). 504 N.W.2d 54 (Minn. 1993).
6. State v. Jack Gorman, Hennepin County District Court No. 91004432 (October 17, 1991).
7. State v. Desiree Lyn Crandall, Hennepin County District Court No. 92093326 (July 29, 1993).
8. State v. Richard Miller, Hennepin County District Court No. 92093321 (July 29, 1993).
9. State v. Gregory Barton, Hennepin County District Court No. 90056594 (December 21, 1991).

10. State v. Lynette Lindgren, Hennepin County District Court No. 90091863 (April 9, 1991).

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Appointed to the Minneapolis Civil Rights Commission, as an Attorney Commissioner. 1977-1982.

17. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

No.

2. whether you practiced alone, and if so, the addresses and dates;

No.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

1973: U.S. Department of Health, Education and Welfare, Social Security Administration. Baltimore, MD.
Office of the General Counsel - Litigation Division,

1974: Neighborhood Justice Center, Inc.
500 Laurel, St. Paul, MN

Criminal Defense Lawyer

1975-1978: Legal Rights Center, Inc. 808
E. Franklin Ave. S.,
Minneapolis, MN

Criminal Defense Lawyer

1978-1983: Hennepin County Public
Defender's Office,
317 2nd Ave. S., Suite 200
Minneapolis, MN 55401

Criminal Defense Lawyer

1983-1984: Hennepin County Municipal
Court, Fourth Judicial District
C-1200 Government Center,
Minneapolis, MN, 55487

Municipal Court Judge

1984-Present: Hennepin County District
Court, Fourth Judicial District
C-1756 Government Center,
Minneapolis, MN, 55487

District Court Judge

- b. 1. **What has been the general character of your law practice, dividing it into periods with dates, if its character has changed over the years?**

From 1971 to 1973 I was a law clerk at the Legal Rights Center, Inc., in Minneapolis, Minnesota. The Legal Rights Center, Inc. is a non-profit agency which was formed to give racial minorities in the metropolitan area an alternative to the public defender system. The Center is a unique organization since it was originally funded by the generous contributions from the large law firms in Minneapolis. My duties as a law clerk included trying misdemeanor cases under the supervision of a practicing attorney, performing legal research and writing memoranda for the staff attorneys. I also performed investigative work on cases.

In the summer of 1973, I left the Legal Rights Center, Inc. to explore my interests in international law. I studied at The Hague Academy of International Law at a four-week summer session in Hague, Netherlands. When the session concluded, I traveled in Europe for a short period of time and came back to Washington, D.C., to work at the U.S. Department of Health, Education and Welfare, Office of the General Counsel, Social Security Administration in Baltimore, Maryland.

In early 1974, I came back to the Twin Cities area of Minnesota to work at the Neighborhood Justice Center in St. Paul as a criminal defense lawyer. The Neighborhood Justice Center is similar to the Legal Rights Center, Inc., as it is an alternative to the

public defender system of Ramsey County. At the Neighborhood Justice Center, I represented indigent clients who were distrustful of the public defender system. These individuals were charged with felonies, including aggravated robbery, burglary, criminal sexual conduct, and felony theft. I also represented the clients in misdemeanor matters such as assault, disorderly conduct, prostitution and misdemeanor theft. While at the Neighborhood Justice Center, in 1974, I attended the National Institute for Trial Advocacy to further my trial skills. This was a three-week session held in Reno, Nevada.

In 1975 I was rehired by the Legal Rights Center, Inc., as a criminal defense lawyer. I was elevated to handling the high-profile cases which included murder, aggravated robbery, felony assault and criminal sexual conduct charges. In the summer of 1975, I attended a three-week session at the National College of Criminal Defense and Public Defenders in Houston, Texas.

In 1978, I was hired by the Office of the Hennepin County Public Defender as a staff attorney. While there, I handled only felony and misdemeanor cases, and I was given many of the high-profile cases in that office.

On February 9, 1983, I was appointed to the Hennepin County Municipal Bench. In furthering my judicial education, in 1983, I attended the National Judicial College General, General Jurisdiction.

In March 1984, I was appointed to the Hennepin County District Court Bench. This quick elevation to District Court was based on my outstanding performance on the bench as a Municipal Court judge. As a District Court judge, I have furthered my legal education by attending the 1984 National Judicial College on Civil Litigation, which was a one-week course. In 1986, I attended the American Academy of Judicial Education for a one-week session on Evidence. Additionally, I attended the Academy in 1987 for a one-week session on Criminal Trial Skills, and, in 1991, I attended the Academy for a one-week session on Advanced Evidence.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

1974-1983: Criminal Defense Lawyer. Represented indigent criminal defendants in all types of criminal cases; murder, assault, criminal sexual conduct, controlled substance crimes, burglary, theft, driving under the influence.

1983 - Present: Trial Court Judge

1983-1984: Presided over misdemeanor and gross misdemeanor cases, civil cases where amount in controversy did not exceed \$15,000, landlord/tenant disputes, implied consents, and administrative appeals.

1984-July 1991 and January 1993-Present: Preside as a general jurisdiction trial judge in all types of civil and criminal cases.

July 1991-December 1992: Presided over marital dissolutions, paternity, child support, custody and other family court issues.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearance in court varied, describe each such variance, giving dates.

Frequently.

2. What percentage of these appearances was in:
 (a) federal courts 0%
 (b) state courts of record 100%
 (c) other courts. 0%
3. What percentage of your litigation was:
 (a) civil 0%
 (b) criminal. 100%
4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

From 1974 through 1982, I averaged between 8-12 jury trials per year, and 5-10 court trials per year. On the vast majority of cases (96%) I was sole counsel. On the other cases (4%) I was either principal counsel or co-counsel.

5. What percentage of these trials was:
 (a) jury 75%
 (b) non-jury 25%

18. **Litigation:** Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Part 1

1. State v. Richard Carpenter, Hennepin County District Court File No. 77900180

Trial Counsel for the defense: Michael J. Davis

Prosecutor: Williams Edwards (612) 348-7787
C-2000 Government Center
Minneapolis, MN 55487

Judge: The Honorable Allen Oleisky

Charge: Criminal Sexual Conduct 1st Degree

Facts: This case involved an insanity defense to a rape charge. Prior to 1976, no rape charge had been tried with an insanity defense in Minnesota. This complex trial was tried to the court after the defendant waived his right to a trial by jury.

The State of Minnesota has adopted the strict M'Naghten standard for insanity defense.

No person shall...be excused from criminal liability except upon proof that at the time of committing the alleged criminal act he was laboring under such a defect of reason, from one of these causes, as not to know the nature of his act, or that it was wrong. Minn. Stat. § 611.026.

Richard had a long history of being abused as a child. In 1969 at the age of 18, Richard was sent to prison on a aggravated arson charge. At St. Cloud reformatory, Richard started hallucinating. In 1972, Richard assaulted a male

psychiatric technician. In the fall of 1975, Richard attempted suicide by drinking toilet cleaning fluid. He also assaulted a staff nurse and was placed in isolation. In isolation, he believed that his bed was breathing and he heard the sound of flies buzzing. Richard hallucinated wild animals surrounding him and growling in his bed at night. At times, he had trouble distinguishing himself from the animals and believed he had turned into a lion.

The evening before the rape, which occurred on April 8, 1976, Richard had a severe psychotic episode. He believed he had turned into a lion, and was growling and foaming at the mouth. He arrived at the halfway house, mimicking a lion. He ran to his uncle's Pentecostal church, where his cousin and her husband, both Pentecostal, seeing him growling like an animal, performed an exorcism on Richard to rid him of the demon.

After the exorcism, Richard was taken back to the halfway house, but was refused admittance. The next day, Richard was diagnosed by Dr. Pilling as being schizophrenic, meaning, basically, Richard had lost contact with reality. Dr. Pilling felt that Richard did not know what he was doing, but understood right from wrong and was able to make conscious decisions regarding right and wrong. Dr. Pilling concluded that Richard was no danger to himself, or others, and decided against hospitalization. Several hours later, Richard committed the rape.

Dr. Carl Malmquist, the consulting psychiatrist of the Hennepin County Bureau of Community Corrections, Psychological Services, diagnosed Richard as being in a psychotic-depressive state at the time of the rape. It was Dr. Malmquist's opinion that this mental illness deprived Richard of control over his willpower to choose between right and wrong. The trial court rejected the insanity defense and found Richard guilty.

Judgment of Trial Court affirmed in State v. Carpenter, 282 N.W.2d 910 (Minn. 1979).

I handled all aspects of case including the investigation, submitting motions, discovery, trial and sentencing.

Dates of representation: April 28, 1976-January 31, 1978.

2. State v. Willis Lawrence Hardimon, Hennepin County District Court File No. 80900768

Principal Defense Counsel: Michael J. Davis

Associate Co-counsel: The Honorable Pamela Alexander
(612) 348-5558
C-1001 Government Center
Minneapolis, MN 55487

Prosecutor: Michael McGlennen (612) 333-9999
333 3rd Ave. S.
Minneapolis, MN 55415

Judge: The Honorable Crane Winton

Charge: Murder 1st Degree; Murder 2nd Degree

Facts: This case involved the highly publicized murders of an elderly couple. On March 2, 1980, the bodies of the couple were discovered executed in the front bedroom of their south Minneapolis home. Both were seated in chairs they normally used in the living room. The chair in which the woman was seated was tipped over. The man had three bullet wounds to the head and chest and the woman had two bullet wounds, to the head and shoulder. The evidence suggested the murders had taken place between 8 and 9:00 p.m. on March 1, 1980 and that the murderer had taken items from the home.

The investigation led the police to defendant. On March 15, 1980, a number of search warrants were executed. Defendant was arrested at his brother's home when he opened the door to the police. Defendant waived his Miranda rights and initially denied any involvement in the murders. Later, he changed his story, and claimed he and another man had been involved in a burglary. When they left the house, they observed two other men arrive. The officer told defendant that he did not believe him, that he believed defendant murdered the couple. Defendant then admitted the shootings.

Defendant stated he was intoxicated the day of the murders and looked into the couples' home. He and his companion then decided to break in, tie up the couple and steal the television. He was allowed into the home peacefully, but shot the man when he tried to grab at the gun. He then shot the woman because she started screaming, and because he did not want her to identify him. Defendant stated

he then moved the bodies into a bedroom and ransacked the house. Defendant claimed he threw the murder weapon into the river.

At trial, defendant again changed his story. He testified that he did not speak with his companion before entering the couples' home and that he fired all shots at once after the man tried to grab the gun. He attributed the shootings to the fact that he had consumed excessive quantities of alcohol and smoked a large amount of marijuana.

Defense counsel attempted to introduce expert testimony on defendant's level of intoxication at the time of the killings and his Vietnam War flashbacks to establish lack of specific intent or premeditation.

The expert witness testified: he was a private consultant in the field of alcohol toxicology; he was certified by the State of Minnesota to instruct law enforcement officers in the toxicology, physiology and pharmacology of alcohol and in the instrumentation and operation of the breathalyzer; he had conducted numerous experiments investigating the physiological effect of alcohol upon the human body, the central nervous system and the brain; and given the necessary data, he could calculate an individual's blood alcohol concentration at any given time. The trial court refused to allow the expert testimony.

The trial court refused to admit evidence regarding Vietnam flashbacks on the basis the defendant had not provided prior notice of a Rule 20 or mental illness defense, as required by the Minnesota Rules of Criminal Procedure, 9.02, Subd. 1(3)(a). The defense was not attempting to assert a M'Naghten insanity defense; rather the defense was attempting to assert the defense of diminished responsibility to challenge the element of specific intent.

The conviction was upheld in State v. Hardimon, 310 N.W.2d 564 (Minn. 1981).

I, along with co-counsel, handled all aspects of case including investigation, discovery, motions, trial and sentencing.

Dates of representation: April 1, 1980-April 15, 1981.

3. State v. Edward Owens, Hennepin County District Court File No. 78800575

Defense Counsel: Michael J. Davis

Prosecutor: Williams Edwards (612) 348-7787
C-2000 Government Center
Minneapolis, MN 55487

Judge: The Honorable A. Oleisky

Charge: Criminal Sexual Conduct 1st Degree;
Burglary

Facts: On December 28, 1977 at approximately 2:00 a.m., the victim was returning to her dorm room at Augsburg College. After entering the room, she was confronted by defendant. He grabbed the victim, placed one hand over her mouth and his other hand around her throat. After locking the door, the defendant put his hand over the victim's nose and mouth, causing her to black out. When the victim regained consciousness, the defendant was on top of her, and raped her vaginally. The defendant threatened to kill the victim if she did not cooperate. After the rape, the defendant told the victim to report the incident to the newspapers so he could read about in the morning, and everyone would know what he had done. The victim later picked the defendant out from the Augsburg College yearbook.

The first trial resulted in a hung jury with the majority of the jurors voted for acquittal. After the second trial, the defendant was found guilty.

The sentence imposed was upheld in State v. Owens, 331 N.W.2d 758 (Minn. 1983).

I handled all aspects of case including investigation, discovery, motions, trial and sentencing.

Dates of representation: January 26, 1978-August 30, 1978.

4. State v. Andre Billy Bryant, Hennepin County District Court File No. 77901066

Defense Counsel: Michael J. Davis

Prosecutor: James Faber (612) 348-4527
C-2000 Government Center
Minneapolis, MN 55487

Judge: The Honorable Richard Kantorowicz

Charge: Murder 2nd Degree

Facts: Friends of the victim had given him a stag party on March 7, 1977. One of the friends arranged for two dancing girls to appear at the party for an agreed fee of \$100. One of the dancing girls arrived in a silver cadillac. Two black males, the defendant and another, remained in the car. The girl went to the party and waited for the other girl to arrive. When the second girl did not show, the one girl danced at the party.

Later that night, defendant and the other man returned to pick up the dancing girl. An argument ensued regarding the fee. Defendant and his companion demanded \$100, but the people who made the arrangements argued they did not owe the full amount because only one girl appeared, and they had ordered two dancers. Defendant and his companions began descending the stairs. A number of the partygoers, who were white, gathered at the top of the stairs. The argument escalated and someone yelled "nigger." Defendant's companion then made a quick move, and the victim punched him and knocked him down the stairs. As defendant went up the stairs, he pulled a gun out of his pocket. He fired the gun into the crowd, but no one was hit. Everyone, except the victim, then retreated. The victim kicked at the defendant, hitting him in the jaw. Defendant then fired at the victim. The victim tried to kick defendant again and the defendant shot him again. One bullet pierced the victim's heart and killed him.

The defendant and his companions fled. The defense at trial was self-defense. A jury returned a guilty verdict.

The conviction was upheld in State v. Bryant, 281 N.W.2d 712 (Minn. 1979).

I handled all aspect of case including investigation, discovery, motions, trial and sentencing.

Dates of representation: March 15, 1977-December 16, 1977.

5. State v. Gary Evans Lundgren, Hennepin County District Court File No. 81901244

Defense Counsel: Michael J. Davis

Prosecutor: Lee Barry (612) 348-4261
C-2000 Government Center
Minneapolis, MN 55487

Judge: The Honorable Susanne Sedgwick

Charge: Aggravated Robbery

Facts: On December 18, 1980, a woman opened the door to the home where she was staying. A man, allegedly Mr. Lundgren, confronted her at the door. He stated he had a package for the woman who owned the home, a local political figure. The man then forced his way into the home, and pushed the woman into a piano. The owner of the home then came out of the bathroom. The man forced both women into the kitchen. As they passed the back door of the house, the man motioned another man to come into the house. The second man had a gun and pointed it at the women while he ordered them to lie on the floor. The women's hands were bound. The first man removed two rings from the homeowner's hand, a twenty-five carat diamond ring and a two carat diamond ring with twenty-five small diamonds. The women identified the men from a photographic lineup.

A jury returned a verdict of not guilty on the charge of aggravated robbery.

I handled all aspects of the case including investigation, discovery, motions and trial.

Dates of representation: March 19, 1981-August 13, 1981.

6. State v. William Burke, Hennepin County District Court File No. 66485

Defense Counsel: Michael J. Davis

Prosecutor: James Faber (612) 348-4527
C-2000 Government Center
Minneapolis, MN 55487

Judge: The Honorable Jonathan Lebedoff

Charge: Murder 3rd Degree

Facts: On August 31, 1979 at approximately 3:49 a.m., officers were flagged down by a man who told the officers there was a female body on the north side of an apartment building located in Minneapolis. The body was found near the sidewalk leading to the doorway to the building. Homicide detectives were called immediately. Upon examination, they discovered that the victim's hair and clothing were wet. Additionally, the victim's wrists were discolored and swollen.

Occupants of the building were questioned, that informed officers that loud noises were coming from the apartment occupied by the victim and the defendant. When officers checked that apartment, they found it in disarray. The control knob had been removed from the TV, pieces of masking tape, with black hair attached, were found. Also recovered in the apartment was a white electrical cord with two covered wires leading from it with 1" of each wire bared. A six foot long covered electrical cord was also found, with a male end but no female end. These ends were also cleaned off. The bathroom was all wet.

An autopsy of the victim revealed two burn marks, each one inch long, on the victim's nipples. The defendant told the officers that he and the victim were watching television when the victim got up to adjust the TV. He heard a pop and saw the victim thrown to the floor. He stated he then dragged the victim outside.

Motions to suppress evidence seized pursuant to an invalid search warrant and warrantless search were filed on behalf of defendant. They were denied.

The jury returned a guilty verdict. This case has been used by the Medical Examiner in lecturing on death by electrocution.

I handled all aspects of the case including investigation, discovery, motions, trial and sentencing.

Dates of representation: September 1, 1976-February 9, 1977.

7. State v. Bobby Flowers, Hennepin County District Court File No. 65685

Defense Counsel: Michael J. Davis

Prosecutor: William Edwards (612) 348-7787
C-2000 Government Center
Minneapolis, MN 55487

Judge: The Honorable Stanley Kane

Charge: Criminal Sexual Conduct 1st Degree;
Kidnapping; Aggravated Sodomy

Facts: On April 17, 1976, the victim and a companion were walking in Minneapolis when they were accosted by a black male. The perpetrator grabbed the victim and pulled out a knife. The perpetrator told the companion to leave and then dragged the victim to a car and drove to another location. He ordered the victim to disrobe. In the back seat of the car, he penetrated the victim vaginally, and forced her to perform oral sex. Thereafter, repeated sexual acts were performed. The perpetrator then drove the victim to another location and let her out of the car. The victim subsequently described the car for police officers. She recalled that the car had an owl ornament. She also described her assailant, including the type of clothing he wore. The victim said that the rapist wrote her telephone number on the car's sun visor. It was later learned the car was registered to the defendant, and that the defendant was wearing clothes which matched the description given by the victim. The victim's telephone number was found on the defendant's car visor. The defense proffered a defense of mistaken identity.

The jury returned a verdict of not guilty on all counts.

I handled all aspects of the case including investigation, discovery, motions and trial.

Dates of representation: April 21, 1976-July 7, 1976.

8. State v. George Gerald Chamberlain, Hennepin County District Court File No. 79900509

Defense Counsel: Michael J. Davis

Co-counsel: David Knutson (612) 348-8560
317 2nd Ave. S.
Minneapolis, MN 55401

Prosecutor: Tom Heffelfinger (612) 339-8682
 Bowman & Brooks
 150 South 5th Street
 Suite 2600
 Minneapolis, MN 55402

Judge: The Honorable William Posten

Charge: Criminal Sexual Conduct 1st Degree

Facts: On December 23, 1978, the thirteen year old victim worked as a babysitter for the defendant and a woman. The victim babysat the woman's five year old child. While she babysat, the victim was alone in the apartment with the child and the defendant. The defendant was thirty-nine years old. At 12:00 p.m. on December 23, 1978, the defendant took a nap and instructed the victim to wake him up at 3:00 p.m. At 3:00, the child was asleep and the victim woke up the defendant as instructed. Upon awakening, the defendant ordered the victim to take off her clothes. The victim refused and the defendant then threatened her. Frightened, the victim removed her shirt. The defendant removed the rest of her clothing. The defendant then forced the victim to perform fellatio upon him. Thereafter, he penetrated the victim's vagina with his penis, and performed cunnilingus upon her. Afterward, the defendant threatened to kill the victim if she told anyone what happened.

The defendant was charged by four separate complaints for committing sex offenses against four different 13 or 14 year old girls. All offenses were joined for one trial. The jury returned guilty verdicts on one count Criminal Sexual Conduct in the First Degree and four counts of Criminal Sexual Conduct in the Fourth Degree.

One judgment was vacated, and all other judgments affirmed in State v. Chamberlain, 301 N.W.2d 313 (Minn. 1981).

I, along with co-counsel, handled all aspects of case including investigation, discovery, motions, trial and sentencing.

Dates of representation: February 27, 1979-July 17, 1979.

9. State v. Richard D. Stangl, et.al., Hennepin County District Court File No. 80901904

Defense Counsel: Michael J. Davis

Counsel for co-defendants: Rick Mattox
(612) 452-4252
3918 Beau D'Rue Dr.
Eagan, MN 55123

Mark Peterson (612) 338-2500
Suite 250, Northstar East
Minneapolis, MN

Prosecutor: Judy Harrigan (612) 348-4797
C-2000 Government Center
Minneapolis, MN 55487

Judge: The Honorable Harold Kalina

Charge: Criminal Sexual Conduct 1st Degree

Facts: On August 8, 1980, the victim and a friend met two men at a party. The men invited them to another party. The victim and her friend accompanied the men to the other party and finally to the home of one of the men. The victim and one of the men went into the house, but her friend and the other man left. Ten minutes later, two other men entered the home. The victim alleged that the three men repeatedly raped her and forced her to perform oral sex upon them. After the victim complained to the police, the three men provided statements to the police that they had engaged in sexual relations with the victim, but that she had consented.

On behalf of all defendants, defense counsel moved to admit evidence of the victim's prior sexual conduct where she met two men at a bar, took them to her home and engaged them in multiple sexual acts involving both oral and vaginal penetration. The defense motion was granted. The jury returned not guilty verdicts for all defendants.

I handled all aspects of case including investigation, discovery, motions and trial for my client, Richard Stangl.

Dates of representation: August 21, 1980-December 5, 1980.

10. State v. Eugene Lawrence Billups, Ramsey County District Court File No. 27193

Defense Counsel: Michael J. Davis

Prosecutor: Mark W. Gehan, Jr. Esq.
1100 W. 1st Nat'l Bank Bldg.
St. Paul, MN
(612) 227-0611

Judge: The Honorable Hyam Segell

Charge: Robbery

Facts: On December 27, 1974, a clerk from a liquor store was making a home delivery to 1141 Hague Avenue, St. Paul, MN. As the clerk reached the house, he was accosted by a man holding a gun who stepped out from behind a tree. The man walked up to the clerk, told him to turn around and robbed him. The clerk later identified the defendant in a line-up.

The defendant was arrested on January 9, 1975 in connection with another incident for which he was not charged. On that date the owner of another liquor store became suspicious of a telephone order to be delivered to 1141 Hague Avenue. A police officer made the delivery, and noticed defendant crouching along the side of the house. The officer identified himself and ordered the defendant not to move. When the defendant turned and ran, the officer shot him. The defendant was arrested and hospitalized. When questioned, the defendant denied any misconduct with respect to the incident. On January 13, 1975, defendant's attorney visited him in the hospital and instructed him not to talk to anyone without counsel present. On January 16, 1975, defendant was placed in a line-up and identified by the clerk who was robbed on December 27, 1974. Defendant was never questioned about the December incident.

Defendant testified that he was with his fiancée and her family on December 27, 1974. His fiancée corroborated the alibi. On cross-examination, over objection by defense counsel, the prosecutor questioned defendant as to why he never mentioned his alibi prior to trial. Defendant was convicted. The conviction was reversed and remanded due to prosecutor's improper impeachment of defendant regarding his alibi. State v. Billups, 264 N.W.2d 137 (Minn. 1978). It is interesting to note that the Minnesota Supreme

Court originally affirmed the conviction. The United States Supreme Court ruled in Doyle v. Ohio, 426 U.S. 610, (1976), that a prosecutor may not impeach a defendant on cross-examination about his failure to provide alibi until trial after receiving Miranda warnings at the time of the arrest. Originally, the Minnesota Supreme Court distinguished Doyle from the present case, but later determined it was error to do so.

Part 2

Names and Addresses of ten attorneys who have appeared before me the most frequently.

1. Steven Redding, Esq.
Office of the Hennepin County Attorney
C-2000 Government Center
300 South Sixth Street
Minneapolis, MN 55487
Telephone: (612) 348-5965
Case: State v. Thomas Schwartz Hennepin County
District Court No. 97549-1
First Degree Murder.

Case: State v. Larry Jobe Hennepin County
District Court No. 88903565
First Degree Murder.
2. Robert J. Streitz, Esq.
Office of the Hennepin County Attorney
C-2000 Government Center
300 South Sixth Street
Minneapolis, MN 55487
Telephone: (612) 348-6954
Case: State v. Larry Jobe Hennepin County
District Court No. 88903565
First Degree Murder.
3. Kathryn Quaintance, Esq.
Office of the Hennepin County Attorney
C-2000 Government Center
300 South Sixth Street
Minneapolis, MN 55487
Telephone: (612) 348-5434
Case: State v. Aldrick Woodruff Hennepin County
District Court No. 93069250
First Degree Murder.

4. Allan H. Caplan, Esq.
525 Lumber Exchange Building
Minneapolis, MN 55401
Telephone: (612) 341-4570
Case: State v. Glenn T. Patterson,
Hennepin County District Court
No. 93854-1
First Degree Murder.
5. Phillip Resnick, Esq.
Phillip Resnick & Associates
701 Fourth Avenue South, Suite 1710
Minneapolis, MN 55415
Telephone: (612) 339-0411
Case: State v. Il Pyo Chung, Hennepin County
District Court No. 84900173
Criminal Sexual Conduct in the First
Degree.
6. Clifford Poehler, Esq.
Hennepin County Public Defender's Office
317 2nd Avenue South, Suite 200
Minneapolis, MN 55401
Telephone: (612) 830-4858
Case: State v. Sybrant, Hennepin County
District Court No. 90006733
Criminal Sexual Conduct in the First
Degree.
7. A. Larry Katz, Esq.
Katz & Manka
4830 IDS Center
80 South 8th Street
Minneapolis, MN 55402-2232
Telephone: (612) 333-1671
Case: In re the marriage of Barbara Lund and
Russell Lund and Star Tribune, Hennepin
County District Court No. DW-160029.
Marriage Dissolution.
8. Kathleen M. Newman, Esq.
Larkin, Hoffman, Daly & Lindgren, Ltd.
7900 Xerxes Avenue South
Bloomington, MN 55437
Telephone: (612) 835-3800
Case: In re the Marriage of Eric M. Kodner
v. Susan Kodner Berdahl Hennepin County
District Court No. DC-165281
Child Custody.

9. Daniel J. Bresnahan, Esq.
 3500 West 80th Street Suite 585
 Bloomington, MN 55431-1068
 Telephone: (612) 835-0123
 Case: Cherie Anderson v. Shenandoah Homeowners Association, Inc. v. Tri-K Sports, Inc.,
 Hennepin County District Court No. 85-6380
 Personal Injury.

10. Fred M. Soucie, Esq.
 100 Anoka Office Center
 2150 Third Avenue
 Anoka, MN 55303
 Telephone: (612) 421-2394
 Case: Killian v. Smoot, Hennepin County
 District Court No. 88-19737
 Personal Injury.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

A. MINNESOTA SUPREME COURT ON RACIAL BIAS IN THE JUDICIAL SYSTEM

The Minnesota Supreme Court Task Force on Racial Bias in the Courts was established by the Chief Justice of the Minnesota Supreme Court to:

- 1) Explore the extent to which racial bias exists in the Minnesota State Court System, by ascertaining whether statutes, rules, practices or conduct work unfairness or undue hardship on minorities in our courts;
- 2) Document, where found, the existence of discriminatory treatment of minority litigants, witnesses, jurors, and of discriminatory hiring and treatment of minority judicial, legal, and court personnel;
- 3) Recommend methods to eliminate racial bias in the courts, including the development and provision of necessary judicial education, the passage of legislation and the promulgation of court rules and policy revisions;

- 4) Monitor, thereafter, the implementation of approved reform measures and evaluate their effectiveness in assuring racial fairness in our courts' processes.

Initially, I was named vice-chair of the Task Force. I thought it best, however, that we have a woman of color in that position, so I stepped down. Thereafter, I was Co-Chair of the Criminal Process Committee, Chair of the Editorial Committee, and a member of the Data Collection Committee for the Racial Bias Task Force.

This study involved the substantive areas of law, procedural and personal issues and issues of access to the court processes. The Task Force collected data on Minnesota court decisions and proceedings, administrative procedures, treatment of litigants and witnesses, and hiring and treatment of people of color within the court system. Committees of the Task Force were formed to focus on the broad areas of criminal, civil, and family and juvenile law.

B. MINNESOTA SUPREME COURT CLOSED CIRCUIT TELEVISION TASK FORCE

I was appointed as a member to the Task Force on Closed-Circuit Television by the Chief Justice of the Minnesota Supreme Court. The task force's mandate was to evaluate whether the use of closed-circuit television to conduct criminal arraignments was in the judicial system's best interest. I was also appointed chair of the Standards and Criteria Committee, and it was our duty to formulate standards for the possible use of closed-circuit television. The Committee's inquiry included: a) when closed-circuit television would be allowed; b) the type of appearances which would be allowed; c) the type of equipment that would be used; d) the making of a record; e) the waiver of an in-court hearing; f) use of translators; and g) who would be present in the courtroom.

The full committee recommended to the Supreme Court the implementation of a pilot project for closed-circuit television. Four members of the Task Force dissented, however, and I wrote the minority report which was the position adopted by our Supreme Court.

C. ATTORNEY GENERAL'S TASK FORCE ON THE PREVENTION OF SEXUAL VIOLENCE AGAINST WOMEN

On June 26, 1988, Attorney General Hubert Humphrey III called for the appointment of a Task Force on the Prevention of Sexual Violence Against Women to: a) find a better solution to the threat of sexual violence; b)

propose specific measures to increase control over sex offenders through sentencing, treatment and supervision; c) take a positive, long-term approach to preventing sexual violence against women through education and early intervention; and d) evaluate the need for and adequacy of services for victims of sexual assault throughout Minnesota.

I was one of two judges from the State of Minnesota to be on this Task Force which ultimately brought about increased penalties for sex offenders.

D. CRIMINAL ASSIGNMENT JUDGE

Beginning in the Fall of 1987 and through 1989, I was appointed by the Chief Judge of my district to become the first criminal assignment judge for the Fourth Judicial District. This was in response to an over-crowded and unmanageable criminal docket. I, along with another judge, formulated a plan to reduce the criminal docket by suspending civil litigation trials for an eight-week time period. This "blitz," as it came to be known, consisted of the entire bench trying only criminal cases. We reduced the backlog by 59%. My involvement in court system administration allowed me to gain the experience necessary to efficiently utilize judicial resources. The criminal assignment judge was in charge of the docket management. I reviewed every felony case and assigned it to a specific judge. I scheduled all trial assignments. Only the criminal assignment judge could grant a continuance on a case. Although this was an extremely difficult assignment, I have found it to be one of the most rewarding experiences I have had during my ten and one half years on the bench.

E. DNA

In 1989, I became conversant in the new scientific procedure known as Forensic DNA Identification Testing. The first DNA case in the State of Minnesota was heard by me State v. Schwartz, 447 N.W.2d 422 (Minn. 1989). This entailed having a Frye hearing which lasted several weeks. I also handled the second DNA case in the State of Minnesota. That case involved the FBI laboratory and the Frye hearing lasted one month. State v. Jobe, 486 N.W.2d 407 (Minn. 1992).

I believe I was the only judge in the United States who had handled two DNA/Frye hearings; one dealing with a private laboratory and the other dealing with the FBI laboratory. Because of my expertise in this area, the FBI Academy has invited me, several times, to lecture at the Academy on the use of DNA in the courtroom.

Currently, I am involved in a project with the Center for Health Policy Research at The George Washington University to develop a judicial desk book on DNA admissibility and its application in criminal suspect identification, genetic testing and gene therapy cases.

F. PROF. ANDREW HAINES vs. WILLIAM MITCHELL COLLEGE OF LAW

In January of 1990, I was approached by two professors from William Mitchell College of Law and asked if I would be interested in mediating the lawsuit initiated by Prof. Andrew Haines against the law school alleging disparate treatment in promotion and tenure. Prof. Haines was the first African American law professor hired by William Mitchell. The lawsuit had been pending in the U.S. District Court for several years. The law school had been torn apart emotionally by the litigation. Professor Haines' case had received extensive coverage in the press, faculty and students alike had chosen sides in the dispute and the controversy threatened to detrimentally affect the school's enrollment and reputation. The Twin Cities community was saddened that those learned in the law could not resolve the serious issues the case presented.

The attorneys for the parties asked for my help. With the approval of the federal judge assigned to the case, I commenced, with Sue Stingley, a professional mediator, what extended into a three-day weekend mediation session, with breaks only for sleeping and eating. The result of our efforts was a dignified and comprehensive settlement of all issues and dismissal of the federal court action. This experience strengthened my belief in alternative dispute resolution as an important complement to litigation.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

State of Minnesota Retirement Fund. I am not entitled to pension until I reach retirement age.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

Given the fact that my wife is a Senior Assistant Hennepin County Attorney in the Civil Division, a conflict-of-interest will arise if I am assigned a case where the Hennepin County Attorney's Office is a party. If such a case is assigned, I will recuse myself. I do not anticipate any other conflicts-of-interests arising during my initial service as a federal district court judge. In the event a conflict should arise, I would follow all applicable procedures as provided in the Codes of Judicial Conduct.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

I am an Adjunct Law Professor at the University of Minnesota Law School. I teach trial practice one semester per year and I receive \$4,400 in compensation. This course is taught once a week during the evening.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See attached Financial Disclosure Report.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

See attached Financial Net Worth Statement.

6. Have you ever held a position or played a role in political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

No.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

My life work has been devoted to "serving the disadvantaged". For the last two and one-half years, I have given my heart and soul to the Minnesota Supreme Court Task Force on Racial Bias in the Courts. The number of hours is incalculable. I have also given speeches at schools, churches and community events on a yearly basis for the past twenty years.

In a typical year, I speak to ninth grade students at Southwest High School about the judicial system. I also read to preschool children at the Seed Academy. Additionally, I speak to different men's groups in local churches. Being an African American gives me numerous opportunities to speak and participate in many community events. I am proud to participate in the minority internship program through the University of Minnesota and also the MACCESS summer enrichment program for St. Paul area minority high school students through Macalester College.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

No.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

There was a selection commission in my jurisdiction that recommended my nomination to the United States District Court, District of Minnesota.

Applications were taken from over sixty persons. I believe close to 50% of the applicants were judges or Federal Magistrate judges. The committee interviewed one-half of the applicants, and screened the candidates to compile a final list consisting of five to seven individuals. A second interview took place with Senator Wellstone and his wife. Thereafter, I was selected by the Senator.

At this time I have completed the FBI and the ABA background investigations and was interviewed by the Justice Department.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism".

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

I recognize the three branches of government, the executive, the legislative and the judiciary, and that the powers of the judicial branch are enumerated in Article III of the Constitution of the United States. It has been, and will continue to be, my practice to observe and obey the doctrine of separation of powers, to follow the Constitution, and precedence in the law.

AD-10
Rev. 1/93

FINANCIAL DISCLOSURE REPORT

 Report Required by the Ethics
Reform Act of 1989, Pub. L. No.
101-194, November 30, 1989
(5 U.S.C.A. App. 6, §§101-112)

1. Person Reporting (Last name, first, middle initial) Davis, Michael J.	2. Court or Organization United States District Court	3. Date of Report November 22, 1993
4. Title (Article III judges indicate active or senior status; Magistrate judges indicate full- or part-time) Article III Judge	5. Report Type (check appropriate type) <input checked="" type="checkbox"/> Nomination, Date <u>Nov. 19, 93</u> <input type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final	6. Reporting Period Jan. 1, 1992 - Nov. 22, 1993
7. Chambers or Office Address C-1756 Government Center Minneapolis, MN 55487	8. On the basis of the information contained in this Report, it is, in my opinion, in compliance with applicable laws and regulations _____ Reviewing Officer Signature _____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on last page.

I. POSITIONS. (Reporting individual only; see pp. 7-8 of Instructions.)

POSITION

NAME OF ORGANIZATION/ENTITY

☐

NONE (No reportable positions)

District Court Judge State of Minnesota - Fourth Judicial District
Adjunct Professor University of Minnesota Law School
Member, Board of Directors '91Try Us Meyerhoff Fund

II. AGREEMENTS. (Reporting individual only; see p. 8-9 of Instructions.)

DATE

PARTIES AND TERMS

☐

NONE (No reportable agreements)

October 6, 1993 University of Minnesota Law School - Adjunct Professor
\$4,400.00 (See attached letter)

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 9-12 of Instructions.)

DATE

SOURCE AND TYPE

GROSS INCOME

(Honoraria only)

(yours, not spouse's)

☐

NONE (No reportable non-investment income)

1	<u>1/1/92 - 12/31/93</u>	<u>State of Minnesota-Salary-Dist.Ct.Judge</u>	<u>\$72,999.00</u>
2	<u>1/1/93 - 11/22/93</u>	<u>State of Minnesota-Salary-Dist.Ct.Judge</u>	<u>\$73,842.88</u>
3	<u>8/1/92 - 12/31/92</u>	<u>Univ. of Minnesota Law School-Salary-Ad.Prof.</u>	<u>\$ 4,400.00</u>
4	<u>8/1/93 - 11/15/93</u>	<u>Univ. of Minnesota Law School-Salary-Ad.Prof.</u>	<u>\$ 2,933.34</u>
5	<u>1/1/92 - 12/31/92</u>	<u>Weddings</u>	<u>\$ 135.00</u>

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

Michael J. Davis

Date of Report

11/22/93

IV. REIMBURSEMENTS and GIFTS - transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp.13-15 of instructions.)

SOURCE

DESCRIPTION

☒ X

NONE (No such reportable reimbursements or gifts)

1		
2		
3		
4		
5		
6		
7		
8		

V. OTHER GIFTS.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp.15-16 of instructions.)

SOURCE

DESCRIPTION

VALUE

☒ X

NONE (No such reportable gifts)

1		\$
2		\$
3		\$
4		\$
		\$

VI. LIABILITIES.

(Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp.16-18 of instructions.)

CREDITOR

DESCRIPTION

VALUE CODE*

☒ X

NONE (No reportable liabilities)

1		
2		
3		
4		
5		
6		
7		

* VALUE CODES: J = \$15,000 or less S = \$15,001 to \$50,000 L = \$50,001 to \$100,000 M = \$100,001 to \$250,000
 H = \$250,001 to \$500,000 D = \$500,001 to \$1,000,000 Z = more than \$1,000,000

VII. INVESTMENTS and TRUSTS – income, value, transactions. (Includes those of spouse and dependent children; see pp. 18-27 of Instructions.)

A. Description of Assets (including trust assets)		B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
Indicate, where applicable, owner of the asset by using the parenthetical (J) for joint ownership of reporting individual and spouse, (S) for separate ownership by spouse, (DC) for ownership by dependent child. Place "X" after each asset exempt from prior disclosure.		(1) Amt. Code (A-E)	(2) Type (S, J, DC, R, or Int.)	(1) Value Code (C-F)	(2) Value Method Code (G-W)	(1) Type (S, J, DC, R, or Int.)	If not exempt from disclosure			
						(2) Month Day	(3) Value Code (C-F)	(4) Gain Code (A-E)	(5) Identity of buyer/seller (if private transaction)	
<input checked="" type="checkbox"/> NONE (No reportable income, assets, or transactions)										
1										
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1 Income/Gain Codes: A-\$1,000 or less B-\$1,001 to \$2,500 C-\$2,501 to 5,000 D-\$5,001 to \$15,000
 (See Col. B1 & B4) E-\$15,001 to \$50,000 F-\$50,001 to \$100,000 G-\$100,001 to \$1,000,000 H-more than \$1,000,000

2 Value Codes: J-\$15,000 or less K-\$15,001 to \$50,000 L-\$50,001 to \$100,000 M-\$100,001 to \$250,000
 (See Col. C1 & D3) N-\$250,001 to \$500,000 O-\$500,001 to \$1,000,000 P-more than \$1,000,000

3 Value Method Codes: Q-Appraisal R-Assessment S-Cash/Market
 (See Col. C2) U-Book Value V-Other W-Other

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

Michael J. Davis

Date of Report

11/22/93

VIII. ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate part of Report.)

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C.A. app. 7, § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature

Michael J. Davis

Date

11/22/93

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C.A. APP. 6, § 104, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Judicial Ethics Committee
Administrative Office of the
United States Courts
Washington, DC 20544

UNIVERSITY OF MINNESOTA

Twin Cities Campus

Fredrikson & Byron Professor of Law
Law School285 Law Center
229 19th Avenue South
Minneapolis, MN 55455
612-625-1000
Fax: 612-625-2019

October 6, 1993

The Honorable Michael Davis
Hennepin County District Judge
Hennepin County Government Center
Minneapolis, MN 554502

Dear Judge Davis:

Last night I was delighted to hear that you are still interested in teaching in our Trial Practice program after you become a federal judge. That is very good news for us. We will plan on having you next year.

Thanks.

Yours truly,

Roger C. Park
Fredrikson & Byron
Professor of Law
Coordinator, Trial Practice Program

:pb

III Non-Investment Income - continued

6.	3/92	Lecturer - FBI Academy	\$500.00
7.	1/1/93 - 11/22/93	Weddings	\$ 50.00
8.	4/24/93	Robins, Kaplan, Miller & Ciresi, Trial Practice Instructor	\$300.00
9.	4/21/93	Minnesota Advocacy Institute, Trial Practice Instructor	\$750.00
10.	5/5/93	Minnesota Advocacy Institute, Trial Practice Instructor	\$750.00

Spouse

11.	1/1/92 - 12/31/92	Hennepin County Attorney's Office (s) Senior Assistant County Attorney
12.	1/1/93 - 11/22/93	Hennepin County Attorney's Office (s) Senior Assistant County Attorney

UNITED STATES SENATE
Committee on the Judiciary
Washington, D. C. 20510-6275

QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name: (include any former names used.)

Ancer Lee Haggerty
2. Address: List current place of residence and office address(es).

Home address: 6405 N. E. 41st Avenue
Portland, Oregon 97211

Office Address: 308 Multnomah County Courthouse
1021 S. W. 4th Avenue
Portland, Oregon 97204
3. Date and place of birth:

August 26, 1944
Vanport, Oregon
4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Married
Wife: Julie Ann Haggerty
(Maiden name: Blair)
Teacher on Special Assignment (TOSA)
Portland Public Schools
Boise-Eliot Elementary School
620 N. Fremont
Portland, Oregon 97227
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

University of Oregon
Eugene, Oregon
September, 1962 through December, 1963

Multnomah Junior College
Portland, Oregon
January, 1964 through March, 1964

Portland State University
Portland, Oregon
March, 1964 through July, 1964

University of Oregon
Eugene, Oregon
September, 1965 through March 1967
B.S. General Social Science, March 17, 1967

Hastings College of Law
San Francisco, California
August, 1970 through May, 1973
J.D. Degree, May 19, 1973

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Garrett Freightlines
Portland, Oregon
March/April, 1967 through June, 1967

United States Marine Corp.
June, 1967 through 1970

Thelan, Marin, Johnson & Bridges
San Francisco, California
Law Clerk, Summer 1971

Metropolitan Public Defender
Portland, Oregon
Law Clerk, Summer 1972

Metropolitan Public Defender
Portland, Oregon
Law Clerk, August, 1973 through September, 1973

Metropolitan Public Defender
Portland, Oregon
Staff Attorney, September, 1973 through June, 1977

Souther, Spaulding, Kinzey, Williamson and
Schwabe
Portland, Oregon
Associate Attorney, September, 1977 through 1982

Schwabe, Williamson & Wyatt
Portland, Oregon
Partner, January, 1983 through December, 1988

Multnomah County District Court Judge
Portland, Oregon
January, 1989 through February, 1990

Multnomah County Circuit Court Judge
Portland, Oregon
March, 1990 through present

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

United States Marine Corps.
Platoon Leaders' Course
June through August, 1966

United States Marine Corps.
Infantry Officer
June, 1967 through July, 1970

First Lieutenant
Serial #0100493

Honorable Discharge

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

University of Oregon Football Scholarship
1963 through 1966

Recipient of Silver Star Medal and Purple Heart
for service in combat, Republic of Viet Nam

University of Oregon Alumni Association Award,
Portland Chapter, 1993.

Martin Luther King, Jr. Elementary School fifth
grade local hero award, 1993.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Oregon State Bar Association

National Bar Association

American Bar Association

Oregon State Board of Bar Examiners
1979 through 1982

Judicial Conduct Committee (Appointed by the Chief
Justice of the Oregon Supreme Court)
1989 through 1992

Member of Governor's Task Force to Evaluate Oregon
Liquor Control Commission (1978)

10. Other Memberships: List all other organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

I am not a member of any organization which is active in lobbying before any public body. I am a member of the Lloyd Center Racquet Club, the Marine Corps League, the American Bridge Association and the Phoenix Bridge Club.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Supreme Court of the State of Oregon
September, 1973

United States District Court for the District
of Oregon
October, 1973

United States District Court of Appeals for the
Ninth Circuit
October, 1977

12. Published Writing: List the titles of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Article on Professionalism
Published in Multnomah Lawyer

Common Trial Mistakes
Oregon Association for Defense Counsel

Jury Selection and Jury Issues
Oregon Law Institute

(Copies attached as exhibit A, B, & C)

13. **Health:** What is the present state of your health? List the date of your last physical examination.

My present health is good. In conjunction with this application, I underwent a physical examination on July 2, 1993.

14. **Judicial Office:** State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

Multnomah County District Court
January, 1989 through February, 1990
Appointed by Governor Neil Goldschmidt
District Court has jurisdiction of all misdemeanor criminal matters and civil matters below \$10,000.

Multnomah County Circuit Court
Appointed March of 1990 by Governor Neil Goldschmidt
Elected to a 6 year term, May of 1990.
The Circuit Court is a court of unlimited jurisdiction.

15. **Citations:** If you are or have been a Judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Response to Part (1):

It has not been my practice to issue formal written opinions. Therefore, I am listing ten attorneys who have appeared in my court on a regular basis.

David Foster
 Bullivant, Houser, Bailey, Pendergrass &
 Hoffman
 300 Pioneer Tower
 888 S. W. 5th Avenue
 Portland, Oregon 97204
 (503) 499-4421

Alisa B. Fye
 Randall Vogt & Associates
 The Kamm House
 1425 S. W. 20th Avenue
 Portland, Oregon 97201
 (503) 228-9858

James H. Gidley
 Cosgrave, Vergeer & Kester
 Suite 1300
 121 S. W. Morrison Street
 Portland, Oregon 97204
 (503) 323-9000

Gregory D. Horner
 District Attorney's Office
 600 Multnomah County Courthouse
 1021 S. W. 4th Avenue
 Portland, Oregon 97204
 (503) 248-3162

Angel Lopez
 Squires & Lopez
 1250 American Bank Building
 621 S. W. Morrison Street
 Portland, Oregon 97205
 (503) 323-9035

Forrest N. Rieke
 Rieke, Geil & Savage
 Suite 200
 820 S. W. 2nd Avenue
 Portland, Oregon 97204
 (503) 222-0200

Michael R. Shinn
 2nd Floor
 219 S. W. Stark Street
 Portland, Oregon 97204
 (503) 242-0113

William N. Stiles
 Sussman, Shank, Wapnick, Caplan & Stiles
 Suite 1400
 1000 S. W. Broadway
 Portland, Oregon 97205
 (503) 227-1111

Mark H. Wagner
 Hoffman, Hart & Wagner
 1200 Koin Center
 222 S. W. Columbia
 Portland, Oregon 97201
 (503) 222-4499

Kenneth R. Walker
 Walker & Warren
 Suite 500
 838 S. W. First Avenue
 Portland, Oregon 97204
 (503) 228-6655

Response to Part (2):

Summary/Citation of Cases Reversed on Appeal

State v. Maskell, 101 OrApp 521, 792 P2d 106 (1990).
 The issue on appeal was whether or not statements made by a police officer, polygraph examiner, were coercive in nature which rendered the defendant's confession involuntary. Although the trial court specifically found that the statements were voluntarily made, the appellate court remanded the case for the trial court to make findings pertinent to whether the advice by the polygraph examiner led the defendant to believe that a refusal to take the polygraph would be an admission of guilt.

William B. Frank v. Fitz Enterprises, 106 OrApp 183, 806 P2d 720 (1991) (aff'd in part, rev'd in part).
 This was a civil breach of contract/fraud case that was tried to a jury. The breach of contract judgment was affirmed but the appellate court reversed the judgment based on fraud, holding that there was insufficient evidence to submit the fraud claim to the jury.

Daiseybelle Helsel v. Western Electric Services, Inc., 106 OrApp 307, 797 P2d 381 (1990).
 This was a personal injury action where the plaintiff claimed an injury as a result of falling on an elevator in a parking structure. The jury returned a verdict for the defendant but the appellate court reversed holding that one of the jury instructions was erroneous.

Oregonian Publishing Company, et al v. Ancer L. Haggerty, Court of Appeals No. A-67037 (October, 1990)
This was an appeal challenging my Order that the media was precluded from contacting the jurors who decided Berhanu v. Metzger. Following the trial, I had the jurors vote as to whether or not they desired to be interviewed by members of the media and since the vote was 14 to 0, I allowed the alternates to vote as well, I instructed the media that they should honor the jurors' request and not contact them. Thereafter, a hearing was held and I issued a formal Order precluding the media from contacting the jurors. The Oregonian newspaper appealed this Order to the Oregon Court of Appeals, and moved the court for an order, vacating or staying the order, which was granted by Chief Justice George Joseph of the Oregon Court of Appeals.

State, ex rel. Juvenile Department of Multnomah County v. Bishop, 110 OrApp 503, 823 P2d 1012 (1992) (Affid in part - remanded for reconsideration of Motion for Alternative Disposition).
The issue on appeal was whether a juvenile court has the authority to impose some alternative disposition after a jurisdictional finding. The appellate court held that the trial court erred in concluding that it lacked authority to proceed with an alternative disposition. Therefore, the case was remanded for reconsideration of the Motion for Alternative Disposition.

State v. Kim, 111 OrApp 539, 826 P2d 104 (1992).
The defendant was indicted for the murder of his wife in Multnomah County and the murder of an acquaintance in Union County. As a preliminary matter, I ruled that before evidence of the murder of the acquaintance in Union County would be admissible in the murder trial of his wife, the State would have to show by clear and convincing evidence that defendant had in fact killed the acquaintance. The appellate court reversed ruling that since the state was offering evidence of the other murder, as a motive for the killing of the wife, the state only needed to show the other murder by a preponderance of the evidence. See, State v. Kim, 111 OrApp 1, 824 P2d 1161 (1992)

State v. Perks, 118 OrApp 336, 847 P2d 866 (1993).
The State appealed the trial court's granting of a Motion to Dismiss based on former jeopardy. The defendant had previously been tried for Assault in the First Degree, and at the time, the State asked that the jury be instructed on the lesser included offense of Assault in the Fourth Degree. The jury found the defendant not guilty of Assault in the First Degree, but could not decide whether or not the defendant was guilty or not guilty of Assault in the Fourth Degree. The appellate court reversed the trial court, holding that the statutory framework allowed a prosecution for a lesser included offense, even though the defendant had been found not guilty of the greater charge.

State v. Stromer, 11 OrApp 450, 823 P2d 1053, 121 OrApp 97, 852 P2d 972 (1993).

Defendant was convicted of delivery and possession of a controlled substance. Under the sentencing guidelines, the state sought an enhancement to the defendant's sentence, based on a "scheme or network". In a preceding case, the Oregon Court of Appeals held that the "scheme or network" was unconstitutional and therefore, the defendant's conviction was affirmed but the case was remanded for resentencing.

State v. Morgan, 124 OrApp 229, ___ P2d ___ (1993).

The defendant was convicted of six counts of Kidnapping in the First Degree with a Firearm, one count of Rape in the First Degree with a Firearm, three counts of Robbery in the First Degree with a firearm, three counts of Sexual Abuse in the First Degree with a Firearm, two counts of Attempted Rape in the First Degree with a Firearm, Unauthorized use of a Vehicle with a Firearm and Felon in Possession of a Firearm. These convictions were affirmed on appeal. However, the case was remanded for resentencing since the appellate court found that the sentence exceeded the sentencing guidelines maximum by an appreciable amount. (A copy is attached as Exhibit D.)

Bruce Thompson v. Jean Coughlin, 124 OrApp 398, ___ P2d ___, (1993).

This was a suit for a partnership accounting. The appellate court, on de novo review, reversed the trial court's finding that subsequent letters had terminated the partnership. The Oregon Court of Appeals held that the letters were intended to preserve the parties' right to share in commissions generated by sales made by either partner to existing clients. (A copy is attached as Exhibit E.)

Response to part (3):

Engedaw Berhanu, et al v. Tom Metzger, et al, 119 OrApp 175, 850 P2d 373, (1993)

State v. Weaver, 121 OrApp 362, 854 P2d 962 (1993), aff'd on reconsideration 124OrApp 615, ___ P2d ___ (1993) (A copy is attached as Exhibits F)

State v. Kim, 111 OrApp 539, 826 P2d 104 (1992).

State v. Perks, 118 OrApp 336, 847 P2d 866 (1993).

State v. Agnes, 118 OrApp 675, 848 P2d 1237 (1993).

16. Public Office: State (chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

None.

17. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a Judge and if so, the name of the Judge, the Court, and the dates of the period you were a clerk;

N/A

2. whether you practiced alone, and if so, the addresses and dates;

N/A

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

Staff attorney,
Metropolitan Public Defender
Portland, Oregon
September, 1973 through June, 1977

Associate attorney
Souther, Spaulding, Kinzey, Williamson &
Schwabe
Portland, Oregon
September, 1977 through 1982
Partner
Schwabe, Williamson & Wyatt
Portland, Oregon
January, 1983 through December, 1988

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

I began practicing as a public defender in 1973. In this capacity, I handled criminal cases, initially

in District Court and then in the Circuit Court. The approximate four (4) years I worked as a public defender, I was sole counsel on six murder cases, three of which went to trial.

The next eleven (11) years, I was an associate, and then partner, with Schwabe, Williamson and Wyatt. In this capacity, I was a litigator handling primarily insurance defense cases and other matters principally associated with the insurance industry. In my first year, I wrote numerous appellate briefs. During this time, I handled a variety of cases, including criminal cases, juvenile cases, domestic relations cases, and a few plaintiff personal injury cases. These matters included trials throughout the State of Oregon and in the United States District Court for the District of Oregon.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

My typical former clients consisted primarily of insurance companies. Additionally, I represented a number of corporate self-insured clients such as Ford Motor Company, Lockhead Electronics Company, Baccardi, Inc. and Montgomery Ward, Inc.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I appeared in Court frequently.

2. What percentage of these appearances was in:

- (a) federal courts;
5% to 10%
- (b) state courts of record;
90% to 95%
- (c) other courts.

3. What percentage of your litigation was:

(a) civil;

(b) criminal:

1973 to 1977 - 0% Civil
100% Criminal

1977 to 1988 - 95% Civil
5% Criminal

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), including whether you were sole counsel, chief counsel, or associate counsel.

I have tried in excess of 100 jury trials. All of which I was sole counsel, except for four or five cases where I was associate counsel in major complex litigation.

5. What percentage of these trials was:

(a) jury;

70%

(b) non-jury.

30%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also, state as to each:

(a) the date of representation;

(b) the name of the court and the name of the Judge or judges before whom the case was litigated, and

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

State v. Niehuser, 21 OrApp 33, 533 P2d 834 (1975). I was appointed to represent Mr. Niehuser at the trial court level and on appeal. Deputy District Attorney Lee Matthews represented the state at trial and the State Attorney General's office handled the appeal. Mr. Niehuser was charged with theft by receiving. The issue on appeal was

whether stolen property which had been recovered by the police could still be the basis for a prosecution of theft by receiving. I argued at the trial court level that Mr. Niehuser could only be convicted of attempt. The case was tried before the Honorable Alan F. Davis in the Circuit Court of Multnomah County, Oregon. The Oregon Court of Appeals reversed the trial court holding that the defendant could only be convicted of attempt since the property no longer could be characterized as stolen property.

Stayton Cooperative Telephone Company v. Lockheed Electronics Company, Inc. 79 OrApp 193, 717 P2d 1283 (1986). Plaintiff was represented by J. Randolph Pickett, 1125 American Bank Building, 621 S. W. Morrison Street, Portland, OR 97205, telephone no. (503) 226-3628. I was trial counsel for Lockheed Electronics and Mildred J. Carmack, 1600-1800 Pacwest Center, 1211 S. W. 5th Avenue, Portland, Oregon 97204, telephone no. (503) 222-9981, handled the appeal on behalf of Lockheed Electronics. This was a breach of contract action tried in the Circuit Court of Marion County before the Honorable Duane R. Ertsgaard. At the close of plaintiff's case, the trial court granted defendant's Motion for a Directed Verdict, which was affirmed on appeal.

Highfield v. Hoffman Construction Company. 87 OrApp 328, 742 P2d 68 (1987). This was an employer's liability act and negligence action by plaintiff against my client, Hoffman Construction Company. Plaintiff was represented by Des Connall, 1501 S. W. Harrison Street, Portland, Oregon 97201, telephone no. (503) 227-2688, and Dan Lorenz, 521 S. W. Clay Street, Portland, Oregon 97201, telephone no. (503) 222-1161 and the matter was tried in the Circuit Court of Multnomah County, the Honorable Robert Redding presiding. The jury awarded plaintiff 1.1 million dollars and the issue on appeal was whether the trial court erred in granting a partial directed verdict in favor of the plaintiff on the ELA claim and with respect to the court's jury instructions on the ELA claim. On appeal, defendant argued that since the court had erred in granting the partial directed verdict in favor of plaintiff, that in and of itself affected the jury's verdict on the negligence claim. However, the Oregon Court of Appeals did not agree

and without ruling on defendant's ELA claimed errors, affirmed the Judgment on the basis of the negligence action.

Audas v. Montgomery Ward, Inc. 79 OrApp 718, 719 P2d 1334 (1986). This was a slip and fall action against my client, Montgomery Ward. Plaintiff was represented by Kelly K. Brown, 3224 S. E. Alder, Portland, Oregon 97214, telephone no. (503) 231-1929, and the matter was tried in the Circuit Court of Multnomah County, the Honorable Lee Johnson presiding. After a jury verdict in favor of the plaintiff, the trial court granted defendant's motion for Judgment Notwithstanding the Verdict. The issue on appeal was whether there was sufficient evidence to support plaintiff's contention that defendant, Montgomery Ward, should have been aware of a substance on its floor. The Oregon Court of Appeals reversed and remanded with instructions to reinstate plaintiff's verdict.

Hopkins v. State of Oregon, 96 OrApp 717, 773 P2d 825 (1989). This was an adverse possession case where I represented the plaintiffs in the trial court and on appeal. The State of Oregon was represented by Luther L. Jensen, Assistant Attorney General, Department of Justice, 100 Justice Building, Salem, Oregon 97310, telephone No. (503) 378-4400. The matter was tried in the Circuit Court, Clatsop County, the Honorable Thomas E. Edison presiding. The trial court ruled that my client had in fact established a claim to the disputed parcel of land by adverse possession. However, the trial court then ruled that the State of Oregon reacquired the property by adverse possession from my clients. This was the issue on appeal and the appellate court affirmed the trial court's ruling.

Berger v. Corey. Number 85-2140. Plaintiff was represented by John M. Wight, 1415 American Bank Building, 621 S. W. Morrison, Portland, Oregon 97205, telephone no. (503) 222-6491, and I represented the defendant. This was a breach of lease, trespass and suit for injunctive relief brought in the Circuit Court of Clatsop County in February, 1986, the Honorable Thomas E. Edison presiding. Plaintiffs claimed that my clients, who had previously owned a bakery, breached the lease provision when my client began construction of a commercial retail store on a part of the property that had previously been the parking lot for the

bakery. The jury returned a verdict in favor of the defendant and the court denied any injunctive relief.

McFaul v. Souther, Number A89509-05572. This was a conversion, unjust enrichment, breach of contract and negotiating a NSF check brought in the Circuit Court of Multnomah County, the Honorable Kathleen B. Nachtigal presiding. Plaintiffs were represented by Michael Bloom, 1125 Yeon Building, 522 S. W. 5th Avenue, Portland, Oregon 97204, telephone no. (503) 223-2608. I represented defendant and filed five counterclaims based on conversion, failure to timely pay wages, negotiating a NSF check, and breach of contract. The case was tried in August of 1987 and the jury returned a verdict in favor of the defendant on his counterclaims.

Dennis Kim Estrada v. Lake Oswego School District. United States District Court for the District of Oregon, Case No. CV 82 336. This was a negligence action. The plaintiff dove into Lake Oswego and fractured his neck. Plaintiff was represented by Brian Welch, 5441 S. W. Macadam, Portland, Oregon 97201, telephone number (503) 221-0870, and I represented defendant, Lake Oswego School District. The case was tried before the Honorable Magistrate Judge Edward Leavy. The jury returned a defense verdict.

Toyota Motor Distributor Inc. v. Stanley Smith Security, Inc.. United States District Court for the District of Oregon, Case no. CV 82-0823. Plaintiff was represented by Steven Blackhurst, 222 S. W. Columbia Street, Suite 1800, Portland, Oregon 97201, telephone no. (503) 226-1191, and I represented defendant. The case was tried before Magistrate Judge Edward Leavy in June, 1983. Defendant's employee, a security guard, was caught stealing merchandise from plaintiff's warehouse. Instead of immediately contacting defendant and demanding that the employee be fired, plaintiff worked with the Port of Portland security and with federal agents in trying to decipher who was fencing the stolen merchandise. Although the jury returned a verdict in favor of plaintiff, it was substantially below their prayed for amount. I can only assume that the jury accepted the defense argument that the defendant should not be held responsible for the substantial loss in light of the fact that plaintiff continued to observe the

security guard and did nothing to prevent the additional thefts.

Gerald Hearing v. Porter Paint Company, United States District Court for the District of Oregon, Case No. CV 82 1286. In this matter, Plaintiff was represented by Dan O'Leary, 3320 S. W. Underwood Drive, Portland, Oregon 97225, telephone number (503) 292-9879 and I represented defendant, Porter Paint Company. The case was tried before Magistrate Judge William Dale. Plaintiff was an industrial painter who claimed that my client had failed to properly warn him of certain components used in its paint. It was our contention and theory that plaintiff's problems were caused by the period of time that he had been an industrial painter and not necessarily by the use of our particular paint. The jury awarded a verdict in favor of plaintiff that was substantially below the prayed for amount or his settlement demand.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

At this time, no particular case comes to mind that was settled prior to litigation, although I am sure I must have settled hundreds of cases on a pre-trial basis. During the time that I was with Schwabe, Williamson and Wyatt, I wrote numerous opinion letters pertaining to whether or not insurance companies had a duty to defend the case as well as whether there was coverage for a particular claim.

Between 1974 and 1979, I served on the Portland Civil Service Board where I essentially served as a hearing officer with respect to the city's policy, procedures, and disciplinary actions. I also served on the Portland Cable Regulatory Commission between 1983 and 1985. This body handled all matters dealing with the cable television industry within the city of Portland. Between 1979 and 1982, I was a member of the Oregon State Board of Bar Examiners and thereafter, on an individual as well as a group basis, I have

tutored minorities who have had difficulty with the examination or were initially preparing to take the Oregon State Bar examination. From 1989 through, 1992, I was a member of the Oregon State Judicial Conduct Committee. This committee entertains questions of judges to determine whether or not they should or should not engage in specified conduct that might violate the Oregon Judicial Code of Conduct for Judges. The Board would review the matter and submit a written recommendation to the Supreme Court which would ultimately make a determination.

II. FINANCIAL DATA AND CONFLICT OF INTEREST

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationship, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

My wife and I have separate accounts in the Oregon Public Employees Retirement system. Also, my wife has a TSA deferred income account.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of Litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

If a potential conflict of interest arose, I would of course disclose it and if it was such that the parties would not stipulate that I could continue with the matter, I would recuse myself. In order to avoid a conflict of interest, I would list all of my prior major clients and before accepting a case on an assignment basis, I would make sure that we did not have a potential conflict of interest. As stated above, if a potential conflict arose, I would disclose it to the parties and then if the matter were not resolved, it would then be assigned to a different Judge. It is my full intent to comply with the Code of Judicial Conduct as it relates to conflicts of interest.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See attached copy of financial disclosure report marked Exhibit G.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

See attached Exhibit H.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I was the treasurer for the re-elect Mike Schrunck, District Attorney Committee in 1980 and 1984. As treasurer, it was my responsibility to keep an accounting of all expenditures and donations and file appropriate required forms with the Secretary of State.

I was the treasurer for BOB-PAC (Black Oregonians for Business-Political Action Committee) from 1984 through 1988. As the treasurer it was my responsibility to keep an accounting of receipts and expenditures and file appropriate required forms with the Secretary of State.

I personally campaigned for election to the Circuit Court of Multnomah County in 1990.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or

professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

For approximately five or six years, as an attorney with Schwabe, Williamson and Wyatt, I was the coordinator for the Multnomah County Bar Pro-bono program. In this capacity, it was my responsibility to clear and check for conflicts with all of the proposed pro-bono clients as well as once it was determined that no conflict existed, I would then review the file and assign the file to one of the volunteer lawyers within the firm. It seemed that my practice was to assign most of the cases to myself, or a fair number of the cases to myself. I estimate that I represented 30 to 35 clients through the Bar program but at this time, there is no way that I could give a true estimate of the amount of time I devoted to each case nor on a collective basis. I can only say that once the matter was accepted, it was pursued with the same amount of vigor and commitment that was used insofar as retained clients. For approximately 3 and 1/2 years, when I first was admitted to practice, I worked as a public defender which mandated that I exclusively handle cases for indigent clientele. Most of which were, in my thinking, disadvantaged.

For two years, I volunteered approximately 10 to 15 hours working as a coach and practice judge for the Jefferson High School Mock Court team. I also served in a similar capacity with the Grant High School Mock Court team. I was an assistant coach for the Whitaker 7th and 8th grade pop Warner football team and over the years, have probably spoken at 10 to 15 elementary, middle and high school classes and assemblies on various subjects.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a Judge to hold a membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with the dates of membership. What you have done to try to change these policies?

From 1978 through December of 1988, I was a member of the University Club of Portland. Although it

allowed female members, they were not voting members of the club and were barred from the men's grill. I resigned my membership effective December 31st, 1988.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

I was informed by Katherine O'Neil, one of my former associates at Schwabe, Williamson and Wyatt, that Magistrate Judge Jelderks' nomination was not going forward due to the change in administrations. I was told Congressman Ron Wyden's office was seeking applications from those interested in the position. I then forwarded a letter of interest, along with a resume, to Governor Barbara Roberts' office as well as to Congressman Ron Wyden's office. Thereafter, a selection committee, chaired by Susan Hammer of Stoel, Rives, Boley and Frasier, was selected and I forwarded a formal application to the selection committee. I went through an oral interview with the entire selection committee and was selected as one of three finalists that the committee recommended to Governor Barbara Roberts' office and Congressman Ron Wyden's office. Thereafter, I was interviewed by Congressman Ron Wyden and Lou Savage, and then by Governor Barbara Roberts and her assistant, Kerry Barnett. I then met with Senator Mark Hatfield on July 8th, 1993.

On October 14, 1993, I was interviewed by representatives of the Department of Justice, and thereafter I was interviewed by a representative of the American Bar Association and underwent the formal background investigation by the Federal Bureau of Investigation. On November 19, 1993, I was nominated by President William J. Clinton.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such a case, issue or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary with the Federal government, and with society generally, has become the subject of increasing controversy in recent years. It has become a target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. A tendency by the judiciary toward problem-solution rather than grievance-resolution
- b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Judges must handle cases on a case by case basis and make rulings in accordance with what they believe the correct rule of law is without regard to how a particular ruling might affect third parties not associated with the case. In so ruling, Judges must keep in mind issues such as standing, ripeness and judicial precedent.

NO-10
Rev. 1/83

FINANCIAL DISCLOSURE REPORT

 Report Required by the Statute
 Reform Act of 1989, Pub. L. No.
 101-194, November 30, 1989
 (5 U.S.C.A. App. 5, §§101-112)

1. Person Reporting (Last name, first, middle initial) Haggerty, Ancer L.	2. Court or Organization United States District Court for the District of Oregon	3. Date of Report 11/23/93
4. Title (Article III Judges indicate active or senior status; Magistrate Judges indicate full- or part-time) Article III (active)	5. Report Type (check appropriate type) <input checked="" type="checkbox"/> Election, Date 11/19/93 <input type="checkbox"/> Initial <input type="checkbox"/> Annual <input type="checkbox"/> Final	6. Reporting Period 1/1/92 through 11/1/93
7. Chambers or Office Address U. S. Courthouse (tentative) 620 S. W. Main Portland, Oregon 97205	8. On the basis of the information contained in this Report, it is, in my opinion, in compliance with applicable laws and regulations _____ Reviewing Officer Signature _____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts,
checking the NONE box for each section where you have no reportable information. Sign on last page.

I. POSITIONS. (Reporting individual only; see pp. 7-8 of Instructions.)

POSITION

NAME OF ORGANIZATION/ENTITY

☐

NONE (No reportable positions)

 Member, Board of Directors Goodwill Industries of The Columbia Willamette
 1831 S. E. 6th, Portland, Oregon

II. AGREEMENTS. (Reporting individual only; see p. 8-9 of Instructions.)

DATE

PARTIES AND TERMS

☐

NONE (No reportable agreements)

 Oregon Public Employees Retirement System,
 Estimated value as of 11/1/93 - \$27,923.00

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 9-12 of Instructions.)

DATE

SOURCE AND TYPE

GROSS INCOME

(Honorary only)

(yours, not spouse's)

☐

NONE (No reportable non-investment income)

1 Ancer L. Haggerty, State of Oregon Circuit Court Judge	\$ 129,800.00
2 Annual Salary	
3 Julie Ann Haggerty, teacher, Portland Public Schools	\$ "(S)"
4 Honorary	\$ none
5	\$
6	\$

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

Haggerty, Ancer L.

Date of Report

11/23/93

IV. REIMBURSEMENTS and GIFTS - transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp.13-15 of Instructions.)

SOURCEDESCRIPTION☒ X

NONE (No such reportable reimbursements or gifts)

1		
2		
3		
4		
5		
6		
7		
8		

V. OTHER GIFTS.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp.15-16 of Instructions.)

SOURCEDESCRIPTIONVALUE☒ X

NONE (No such reportable gifts)

1		
2		\$
3		\$
4		\$
		\$

VI. LIABILITIES.

(Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp.16-18 of Instructions.)

CREDITORDESCRIPTIONVALUE CODE*☐

NONE (No reportable liabilities)

1	Bank of America Home equity loan, Account #50243107031325001	K
	Lloyd Center, 500 N. E. Multnomah, Portland, Oregon	
3		
4		
5		
6		
7		

* VALUE CODES: J = \$15,000 or less K = \$15,001 to \$50,000 L = \$50,001 to \$100,000 M = \$100,001 to \$250,000
 N = \$250,001 to \$500,000 O = \$500,001 to \$1,000,000 P = more than \$1,000,000

VII. INVESTMENTS and TRUSTS – income, value, transactions. (Includes those of spouse and dependent children; see pp. 18-27 of Instructions.)

A. Description of Assets (including trust assets)		B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period						
Indicate, where applicable, owner of the asset by using the parenthetical (J) for joint ownership of reporting individual and spouse, (S) for separate ownership by spouse, (DC) for ownership by dependent child. Place "X" after each asset exempt from prior disclosure.		(1) Amt. Code (A-E)	(2) Type of dis- trib. ac- ct. (1-7)	(1) Value Code (J-F)	(2) Value Method Code (G-W)	(1) Type of sale, transfer, redemp- tion	If not exempt from disclosure					(1) Identity of buyer/seller (if private transaction)
						(2) Net Sale, Month- Day	(3) Value Code (J-F)	(4) Gain, Code (A-E)				
NONE (No reportable income, assets, or transactions)												
1 626 N.E. Buffalo Portland, OR 97211	B Rent	K	W	none								
2 1/2 interest in 6440 Neptune Street Koads End, OK	A none	K	W	none								
3 Farwest Federal Bank Savings #0504515459	A Int.	J	U									
4 U.S. Government Bonds	A Int.	J	U									
5 Security Benefit Life Variflex Variable Annuity IRA Acct. #1099097-8	A Int.	L	U	one (see explanation)								
6 First Trust Acct. #A398761-0001	A Int.	J	U									
7												
8												
9												
10												
11												
12												
13												
14												
15												
16												
17												
18												
19												
20												

1 Income/Gain Codes: A=\$1,000 or less
(See Col. 4 & 6)

2 Value Codes: E=\$1,000 to \$50,000
(See Col. 7)

3 Value Method Codes: Q=Appraise;
(See Col. 12) U=Book Value

A=\$1,001 to \$2,500
F=\$50,001 to \$100,000
K=\$100,001 to \$500,000
W=\$500,001 to \$1,000,000
X=\$1,000,001 to \$5,000,000
Y=\$5,000,001 to \$9,999,999
Z=Over \$10,000,000 or on-ly
V=Other

C=\$2,501 to 5,000
G=\$100,001 to \$1,000,000
L=\$500,001 to \$1,000,000
M=\$1,000,001 to \$250,000
N=\$250,001 to \$500,000
O=\$500,001 to \$1,000,000
P=\$1,000,001 to \$250,000
Q=\$250,001 to \$500,000
R=\$500,001 to \$1,000,000
S=Assessed
T=Estimated

D=\$5,001 to \$15,000
H=\$15,001 to \$50,000
I=\$50,001 to \$100,000
J=\$100,001 to \$250,000
K=\$250,001 to \$500,000
L=\$500,001 to \$1,000,000
M=\$1,000,001 to \$250,000
N=\$250,001 to \$500,000
O=\$500,001 to \$1,000,000
P=\$1,000,001 to \$250,000
Q=\$250,001 to \$500,000
R=\$500,001 to \$1,000,000
S=Assessed
T=Estimated

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

Haggerty, Ancer L.

Date of Report

11/23/93

VIII. ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate part of Report.)

VII (6) Attached are copies of the Variflex Income/growth series. During the reporting period, there was one transaction where my agent suggested a change which was made. I will file an amendment.

VII (7) First Trust holds part of my IRA account. I own 20 shares, as a limited partner, of Sierra Pacific Development Fund II and Consolidated Cap Instit Prop 2.

IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C.A. app. 7, § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature _____

Date 11/23/93

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C.A. APP. 6, § 104, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Judicial Ethics Committee
Administrative Office of the
United States Courts
Washington, DC 20544



Income/Growth Series 1-800-888-2461, ext. 3028

► Investment Objective:

The Income/Growth Series investment objective is to provide income with long-term growth of capital. Securities selected will have an emphasis on income return, and will include common stocks, convertible securities, preferred stocks and bonds.

► Strategy:

The Income/Growth Series seeks to participate in any market advance through appreciation of the stocks in the portfolio. The Series' emphasis on income should also provide stability to the Series in declining markets.

► Long-Term Growth:

The Income/Growth Series performance has been recognized in its category by all major independent rating services.

- Ranked number 1 out of 20 by Lipper in its growth and income category for the 5 year period ending December 31, 1992.
- Ranked number 2 out of 49 by Morningstar in its balanced fund category for 5 year total return as of December 31, 1992.
- Ranked number 2 out of 42 by VARDIS® in its balanced fund category for 5 year performance as of December 31, 1992.

Past performance is no indication of future results.



John Cleland

Portfolio Manager
Variflex Income/Growth Series

John is a veteran portfolio manager, involved in the securities industry for more than 30 years. John has been a portfolio manager for Security Management Company since 1968.

He supervises portfolio management, trading and research as Senior Vice President of Security Management Company.

"I work to always have assets fully invested, while emphasizing a long-term investment approach to asset management," John said.

He earned a bachelor of science degree from the University of Kansas and an M.B.A. from Wharton School of Finance, University of Pennsylvania. He is active in securities industry affairs, having served as Vice Chairman of the NASD's National Board of Governors and as District Chairman for the association's Business Conduct Committee in District No. 4.

"I work to always have assets fully invested, while emphasizing a long-term investment approach to asset management."

This material must be preceded or accompanied by current prospectuses for Variflex and its funds, which contain complete information about the Series' investment objectives and policies.

Home Depot, Inc. (4.3%)

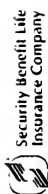
Phillip Morris Companies, Inc. (3.5%)

Telefonos De Mexico, S.A. (3.0%)

Freeport-McMoran Copper Co. (2.8%)

International Game Technology (2.5%)

*As of December 31, 1992, these holdings represented 1% of the portfolio.



Security Benefit Life
Insurance Company
A Member of The Security Benefit
Group

One Security Boulevard
Suite 1000
New York, New York 10020
606-662-5533
77-0664-00

Variflex—Income/Growth Series*

CONVERTIBLE BONDS AND PREFERRED STOCK	Value of \$10,000 Portfolio	COMMON STOCK	Value of \$10,000 Portfolio	COMMON STOCK	Value of \$10,000 Portfolio
Communications McCaw Cellular Communications, Inc.	\$60	Amusement & Recreational Services Dixiey World Company	\$110	Mining Fresquito McMurran Copper Company, Inc.	\$280
Construction Swackdown, Inc.	\$60	Bakery Products Hershey-Battersby Corporation	\$80	Motor Vehicles & Equipment Timothy Davidson, Inc.	\$80
Manufacturing International Game Technology	\$250	Banking & Finance Bank One Corporation Federal National Mortgage Association First Union Corporation Huntington National Bank National Bank Corporation Plymouth Financial Group, Inc.	\$880	Petroleum Refining Tenneco, Inc. Union Texas Petroleum Holdings Pharmaceuticals Amgen Inc Home Products Glaxo Holdings PLC Johnson & Johnson Pfizer, Inc. Selecting Plough Corporation	\$320
Oil & Natural Gas Extraction Cluff Drilling Company OPI International	\$210	Building Materials Chemco S. A. PLC	\$270	Pharmaceuticals Amgen Inc Home Products Glaxo Holdings PLC Johnson & Johnson Pfizer, Inc. Selecting Plough Corporation	\$700
Transportation Kitty Exploration Company	\$80	Chemicals Lyonell Petrochemical Company	\$110	Pharmaceuticals Amgen Inc Home Products Glaxo Holdings PLC Johnson & Johnson Pfizer, Inc. Selecting Plough Corporation	\$130
CORPORATE BONDS		Communications Federal Signal Corporation GTE Corporation Harris King Telecom Limited MCI Telecommunications Corp. Pacific Televis Group Southwestern Bell Telephone Company Telefonos de Mexico, S. A.	\$1,010	Pharmaceuticals Amgen Inc Home Products Glaxo Holdings PLC Johnson & Johnson Pfizer, Inc. Selecting Plough Corporation	\$130
Aircraft Culic Industries	\$110	Consumer Products Colgate Company (The)	\$250	Pharmaceuticals Amgen Inc Home Products Glaxo Holdings PLC Johnson & Johnson Pfizer, Inc. Selecting Plough Corporation	\$130
Communications GTE Corporation	\$120	Electrical Equipment General Electric Company Granger (W W), Inc.	\$250	Pharmaceuticals Amgen Inc Home Products Glaxo Holdings PLC Johnson & Johnson Pfizer, Inc. Selecting Plough Corporation	\$130
Electric Companies United Illuminating Company	\$70	Food & Beverage Colgate Company (The)	\$250	Pharmaceuticals Amgen Inc Home Products Glaxo Holdings PLC Johnson & Johnson Pfizer, Inc. Selecting Plough Corporation	\$130
Finance Mesa Capital Corporation	\$90	Food & Beverage Colgate Company (The)	\$250	Pharmaceuticals Amgen Inc Home Products Glaxo Holdings PLC Johnson & Johnson Pfizer, Inc. Selecting Plough Corporation	\$130
Food & Beverage Grand Union Company	\$450	Food & Beverage Colgate Company (The)	\$250	Pharmaceuticals Amgen Inc Home Products Glaxo Holdings PLC Johnson & Johnson Pfizer, Inc. Selecting Plough Corporation	\$130
Kroger Company Safeway, Inc.	\$450	Food & Beverage Colgate Company (The)	\$250	Pharmaceuticals Amgen Inc Home Products Glaxo Holdings PLC Johnson & Johnson Pfizer, Inc. Selecting Plough Corporation	\$130
Glass Products Owens Illinois	\$220	Food & Beverage Colgate Company (The)	\$250	Pharmaceuticals Amgen Inc Home Products Glaxo Holdings PLC Johnson & Johnson Pfizer, Inc. Selecting Plough Corporation	\$130
Gas Companies & Systems Transco Energy	\$60	Food & Beverage Colgate Company (The)	\$250	Pharmaceuticals Amgen Inc Home Products Glaxo Holdings PLC Johnson & Johnson Pfizer, Inc. Selecting Plough Corporation	\$130
Motor Vehicles & Equipment Chrysler Corporation	\$220	Food & Beverage Colgate Company (The)	\$250	Pharmaceuticals Amgen Inc Home Products Glaxo Holdings PLC Johnson & Johnson Pfizer, Inc. Selecting Plough Corporation	\$130
Oil & Gas Companies Mesa Energy	\$160	Food & Beverage Colgate Company (The)	\$250	Pharmaceuticals Amgen Inc Home Products Glaxo Holdings PLC Johnson & Johnson Pfizer, Inc. Selecting Plough Corporation	\$130
Paper & Lumber Products Sawyer Industries Corporation	\$190	Food & Beverage Colgate Company (The)	\$250	Pharmaceuticals Amgen Inc Home Products Glaxo Holdings PLC Johnson & Johnson Pfizer, Inc. Selecting Plough Corporation	\$130

As of December 31, 1992

1.50.4 (H2 93)
2.2 1.50.4 (H2 93)

The New York City Office of the
 Department of Education
 100 West 45th Street, New York, N.Y. 10018

Variflex

Growth Series

1-800-888-2461, ext. 3028

➤ **Investment Objective:**
The Growth Series investment objective is to achieve capital appreciation by investing in a broadly diversified portfolio of common stocks.

➤ **Strategy:**
The Growth Series strategy is to invest in companies with good potential for capital appreciation given current economic and stock market conditions. The Series utilizes both growth and value investing in hopes of achieving above-average capital appreciation, coupled with lower than average volatility.

➤ **Portfolio:**
The portfolio for the Growth Series is comprised of blue-chip companies that have excellent long-term growth opportunities. Although the Series can be volatile in the short run, it is designed to offer exceptional returns for those people investing for the future.



Terry Milberger
Portfolio Manager
Variflex Growth Series

Terry brings more than 16 years of investment experience to Security Management Company.

He began his career as an investment analyst in the insurance industry and from 1974 through 1978 he served as a Security Management Company assistant portfolio manager. He became manager of pension fund assets for a Houston bank, then returned to SMC in 1981 to manage funds at Security Benefit.

"My investment philosophy is based on patience and opportunity for the long-term investor," said Terry.

He holds a bachelor's degree in business and an M.B.A. from the University of Kansas. Terry is a Chartered Financial Analyst.

This material must be presented in conjunction with current prospectuses for Variflex and SMC Fund, which contain more complete information about the series investment objectives and policies.

"My investment philosophy is based on patience and opportunity for the long-term investor."

Top Five Holdings*

Federal National Mortgage Association (2.7%)
Continental Bank Corporation (2.2%)
Bank of New York (2.2%)
American Telephone & Telegraph Company (2.1%)
Allied - Signal, Inc. (2.0%)

*As of December 31, 1992, these holdings represented 11.7% of the portfolio.



Security Benefit Life Insurance Company

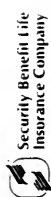
A Member of The Security Benefit Group

One West Main Street, Suite 1000
Kansas City, Missouri 64101

6656A (10/93)
22 6564A-01

Variflex—Growth Series

COMMON STOCKS	Value of \$10,000 Portfolio	COMMON STOCKS	Value of \$10,000 Portfolio	COMMON STOCKS	Value of \$10,000 Portfolio
Aerospace & Defense	\$360	Finance	\$670	Soap, Cleaners and Toilet Goods	\$110
Allied Signal Company		Capitalized Mortgage Corporation		Gillette Company (The)	
Raytheon Company		Federal National Mortgage Association		Toys and Sporting Goods	\$130
Amusement & Recreational Services	\$280	Student Loan Marketing Association		Mattel, Inc.	
Carnival Cruise Lines, Inc.		Washington Mutual Savings Bank		Transportation	\$510
Disney World Company		Food & Beverages	\$170	CX Corporation	
Apparel & Finished Products	\$310	Unilever, Inc.		Consolidated Rail Corporation	
Fruit of the Loom, Inc.		PepperCo, Inc.		Illinois Cent Corporation, Series A	
Phillips Van Heusen Corporation		Hotel Management	\$150	Laidlaw, Inc.	
Banking	\$1,510	Crescent World, Inc.		Utilities	\$140
Bank of Boston		Prudential Companies, Inc.		Prudential West Capital Corporation	
Bank of New York		Medical & Health Care	\$50	Wholesale Trade	\$270
BankAmerica Corporation		Novartis, Inc.		Cardinal Distribution	
Chemical Bank Corporation		Medical Instruments and Supplies	\$220	Sysco Corporation	
Comerica		Allegheny, Inc.		COMMERCIAL PAPER	
Continental Bank Corporation		Metal Fabrication	\$150	Drug Stores	\$130
First Chicago Corporation		Baxter International, Inc.		Rite Aid Corporation	
First Union Corporation		Mining	\$80	Electric Companies & Systems	\$150
National City Corporation		Fluor Corporation		Orange & Rockland Utilities	
Shawmut National Corporation		Hanna (M.A.) Company		Pacific Gas & Electric Company	
Building Materials	\$250	Cypress Minerals Company		Gas Companies & Systems	\$70
Genes S. A. PLC		Motor Vehicles & Equipment	\$50	Northern Illinois Gas Company	
Owens-Corning Fiberglas Corporation		General Motors Corporation		Hotels & Motels	\$100
Chemicals	\$460	Paint & Allied Products	\$140	Hilton Hotel Corporation	
Ferro Corporation		Petroleum Refining	\$150	Nuclear	\$20
Great Lakes Chemical Corporation		British Petroleum Company PLC		Pennsylvania Power & Light	
Praxair, Inc.		Pharmaceuticals	\$510	Petroleum	\$10
Union Carbide Corporation		Abbott Laboratories		Atlantic Richfield	
Communications	\$800	Glaxo Holdings PLC		Telephone & Telegraph	\$140
American Telephone & Telegraph Company		Pfizer, Inc.		BellSouth Capital Funding Corporation	
CBS, Inc.		Publishing & Printing	\$140	CIT Hawaiian Telephone	
LDLDS Communications, Inc.		Smithline-Beecham PLC		CASH & EQUIVALENTS	\$110
MCI Communications Corporation		Retail Trade	\$470		\$10,000
Telefonos de Mexico, S. A.		Kmart Corporation			
Computer Services	\$160	United Int. (The)			
Computer Sciences Corporation		Pennsylvania C. Company, Inc.			
Computer Software	\$180	Toys "R" Us, Inc.			
Microsoft Corporation		Restaurants & Food Service	\$100		
Norwell, Inc.		McDonald's Corporation			
Consumer Goods & Services	\$310	Rubber & Plastic Products	\$200		
Block, (H.R.), Inc.		Cooper Tire & Rubber Company			
VF Corporation					
Electrical Machinery & Electronic Components	\$80				
Mark IV Industries					



Security Benefit Life Insurance Company

A Member of The Security Benefit Group of Companies

2000 CNA Insurance Company, Inc. - New York, NY

65644 (12/93)

22 65644 01

As of December 31, 1992

ASSETS			LIABILITIES		
Cash on hand and in banks	8,650	.00	Notes payable to banks—secured	48,487	.00
U.S. Government securities—add schedule	15,125	.00	Notes payable to banks—unsecured	--	
Listed securities—add schedule	--		Notes payable to relatives	--	
Unlisted securities—add schedule	--		Notes payable to others	--	
Accounts and notes receivable:			Accounts and bills due	--	
Due from relatives and friends	260	.00	Unpaid income tax	--	
Due from others	--		Other unpaid tax and interest	--	
Doubtful	5,200	.00	Real estate mortgages payable—add schedule	27,664	.00
Real estate owned—add schedule	186,000	.00	Chattel mortgages and other liens payable	--	
Real estate mortgages receivable	--		Other debts—itemize:	21,394	.00
Autos and other personal property	90,600	.00	See attached schedule	--	
Cash value—life insurance	18,797	.00	--	--	
Other assets—itemize:			Total liabilities	97,545	.00
Pensions/IRA	143,559	.00	Net worth	370,647	.00
			Total liabilities and net worth	468,192	.00
Total assets	468,192	.00			
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, cosigner or guarantor	1,560	.00	Are any assets pledged? (Add schedule.)	No	
On leases or contracts	--		Are you defendant in any suits or legal actions?	No	
Legal Claims	--		Have you ever taken bankruptcy?	No	
Provision for Federal Income Tax	--				
Other special debt	--				
Total contingent liabilities	1,560	.00			

FINANCIAL STATEMENT
SCHEDULES

ASSETS

Cash on hand and in banks:

	Amount
Cash	\$ 450.00
Bank of America (Limited checking	702.00
Key Bank (Checking)	817.00
Key Bank (Savings)	2,939.00
Far West Federal Bank (Savings)	1,162.00
Far West Federal Bank (Savings)	981.00
Portland Teachers Credit Union	1,600.00
TOTAL (totals should be different)	\$ <u>8,651.00</u>

United States Government Bonds :

	Date Purchased	FMV
Face Value - \$10,000	9/21/92	\$ 5,000
Face Value - \$10,000	2/2/93	5,000
Face Value - \$10,000	11/2/93	5,000
Face Value - \$ 200	6/6/91	100
Face Value - \$ 50	9/12/90	25
TOTAL		\$ <u>15,125.00</u>

Cash Value - Life Insurance:

	Value
Equitable	\$ 8,925
Alexander Hamilton Life	9,872
TOTAL	<u>\$ 18,797</u>

Real Estate:

	FMV
6405 N. E. 41st Avenue Portland, Oregon	\$125,000
626 N. E. Buffalo Street Portland, Oregon	30,000
1/2 Interest in 6440 Neptune Street Roads End, Oregon	30,000
Bare Land Harrison County, Texas	Estimate: 1,000
TOTAL	<u>\$186,000</u>

Personal Property (Automobiles)

1993 Dodge	\$ 24,000
1989 Suburban	17,000
1976 Porsche 912	4,000
TOTAL	<u>\$ 45,600</u>

IRA/Pension Accounts

Oregon State Public Employee Retirement Accounts	\$ 47,310
Security Benefit Life IRAs	96,249
TOTAL	<u>\$143,559</u>

Accounts and Notes Receivable:

Due from relative	\$ 260
Due from renter	5,200
TOTAL	<u>\$ 5,460</u>

LIABILITIES

Notes Payable to Banks - Secured:

	Amount
Bank of America	.
Home Equity Loan	\$ 26,971
Key Bank of Oregon	
Auto Loan	21,516
TOTAL	<u>\$ 48,487</u>

Real Estate Mortgages Payable:

Oregon Department of Veterans Affairs 6405 N. E. 41st Avenue Portland, Oregon	\$ 27,664
--	-----------

Other Debts:

	Amount
Sears Roebuck & Company	\$ 72.00
Nordstrom	284.00
Key Bank of Oregon	155.00
Discover Card	3,300.00
Portland Teachers Credit Union Line of Credit	1,416.00
Monogram Bank of Ohio	827.00
Credit Card Center	8,800.00

Key Bank of Oregon Line of Credit	3,992.00
Key Bank of Oregon Visa	2,548.00
TOTAL	\$ 21,394.00
TOTAL LIABILITIES	\$ 97,545.00
<u>Contingent Liability:</u>	
Julie Haggerty is guarantor for brother, Justin Blair's school loan	\$ 1,560.00

SENATE QUESTIONNAIRE FOR JUDICIAL NOMINEES

1. Full name (include any former names used):

Daniel T. K. Hurley

("Daniel T. Hurley, Jr." was used until confirmation in the seventh or eighth grade.)

2. Address: List current place of residence and office address(es).

Palm Beach County Courthouse
West Palm Beach, Florida 33401

3610 South Ocean Boulevard
Apt. #405
South Palm Beach, Florida 33480

3. Date and place of birth:

February 24, 1943
Fitchburg, Massachusetts

4. Marital Status:

Single

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

St. Anselm's College
Manchester, New Hampshire
September 1960 - June 1964
A.B. Cum Laude, June 1964

St. Vincent de Paul Major Seminary
Boynton Beach, Florida
September 1964 - June 1965

Catholic University of America
Washington, D.C.
Summer Session, 1965

The National Law Center
George Washington University
Washington, D.C.
September 1965 - June 1968
J.D. Degree, June 1968

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

September 1965 - November 1965
Legislative Aide
Office of Congressman Barratt O'Hara
Rayburn House Office Building
Washington, D.C. 20003

November 1965 - August 1967
Mail Sorter
House Post Office
Longworth House Office Building
Washington, D.C. 20003

July - August, 1966
 Legal Intern
 Law Students Civil Rights Research Council
 Washington, D.C.
 Summer Internship in Tallahassee, Florida

August 1967 - August 1968
 Assistant to Manager, Defense Liaison Dept.
 Automobile Manufacturers Association
 1619 Massachusetts Avenue, N.W.
 Washington, D.C. 20036

August 1968 - August 1969
 Law Clerk
 Hon. John Helm Pratt
 U.S. District Judge
 U.S. Courthouse
 Washington, D.C. 20001

August 1969 - October 1969
 Law Clerk
 Hon. Roger Robb
 U.S. Circuit Judge
 U.S. Courthouse
 Washington, D.C. 20001

October 1969 - December 1969
 Attorney
 Vietnam Moratorium Committee
 1029 Vermont Avenue, N.W., Suite #806
 Washington, D.C. 20005

February 1, 1970 - December 31, 1972
 Assistant County Solicitor
 Office of the County Solicitor
 Palm Beach County Courthouse
 West Palm Beach, Florida 33401

January 1, 1973 - December 1, 1975
 Executive Assistant State Attorney
 Office of the State Attorney
 Palm Beach County Courthouse
 West Palm Beach, Florida 33401

December 2, 1975 - September 5, 1977
County Court Judge for Palm Beach County, Florida
Palm Beach County Courthouse
West Palm Beach, Florida

September 6, 1977 - October 18, 1979
Circuit Judge, Fifteenth Judicial Circuit
Palm Beach County Courthouse
West Palm Beach, Florida

October 19, 1979 - February 9, 1986
District Judge, Fourth District Court of Appeal
1525 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33401

February 10, 1986 - Present
Circuit Judge, Fifteenth Judicial Circuit
Palm Beach County Courthouse
West Palm Beach, Florida 33401

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

At St. Anselm's College in Manchester, N.H., I received an A.B. degree "cum laude" and was named to Who's Who in American Colleges and Universities. Also, I was voted into membership in a national scholastic honor society and received the faculty association's award for outstanding student leadership.

In my final year at the National Law Center, George Washington University, I was elected director of the Legal Aid Bureau, a student organization which provided pro bono legal representation to the indigent and elderly population of Washington, D.C. Prior to graduation, I received the student bar association's award for outstanding student leadership.

In 1988, 1989 and 1991, I was elected unanimously by the forty-six judges in the Fifteenth Judicial Circuit of Florida to serve as chief judge.

On two occasions, I ranked at the top of the Palm Beach County Bar Association's judicial poll. Most recently, I was ranked third. In the 1980 Florida Bar merit retention preference poll for appellate judges, I received a 92% favorable vote.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

The Florida Bar

The District of Columbia Bar

The California Bar

The American Bar Association

The Palm Beach County Bar Association

Florida Conference of Circuit Judges, Executive Committee Member: 1989 - 1991

Vice-Chair, Florida Supreme Court Commission on Criminal Discovery, 1988 - 1989

Faculty Member, Florida College for New Judges, 1987 - Present

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

A. Organizations which lobby:

Florida Conference of Circuit Judges

American Bar Association

B. Organizations which do not lobby:

Dune Deck Condominium Association

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Courts of the State of Florida - June 27, 1969 - Present

Courts of the District of Columbia - July 13, 1969 - Present.

United States Circuit Court for the District of Columbia Circuit, October 21, 1969 - Present.

United States District Court for the Southern District of Florida, 1972 - Present.

Courts of the State of California, November 30, 1979 - Present.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

None.

13. Health: What is the present state of your health? List the date of your last physical examination.

My health is good.

June 29, 1993

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such positions were elected or appointed, and a description of the jurisdiction of each such court.

County Court Judge, Palm Beach County, Florida
December 2, 1975 - September 5, 1977
Nominated by judicial nominating commission, appointed by Governor Reubin O'D. Askew, and subsequently elected to a full term without opposition.
Misdemeanor criminal jurisdiction; civil jurisdiction under \$5,000.

Circuit Judge, Fifteenth Judicial Circuit of Florida
September 6, 1977 - October 18, 1979
Nominated by judicial nominating commission, appointed by Governor Reubin O'D. Askew, and subsequently elected to a full term without opposition.
Trial court of general jurisdiction.

District Judge, Fourth District Court of Appeal of Florida

October 19, 1979 - February 9, 1986

Nominated by judicial nominating commission, appointed by Governor Bob Graham, and subsequently retained in a merit-retention election.

Mid-appellate court with plenary jurisdiction with the exception of death-penalty appeals.

Circuit Judge, Fifteenth Judicial Circuit of Florida

February 10, 1986 - Present

Nominated by judicial nominating commission, appointed by Governor Bob Graham, and subsequently elected to a full term without opposition.

Trial court of general jurisdiction.

- 15 Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

SIGNIFICANT OPINIONS

State v. Douse, 448 So.2d 1184 (Fla. 4th DCA 1984), approved sub nom. Peoples v. State, 612 So.2d 555 (Fla. 1992).

Trees v. K-Mart Corp., 467 So.2d 401 (Fla. 4th DCA), review denied, 479 So.2d 119 (Fla. 1985), approved sub nom. Sims v. Brown, 574 So.2d 131 (Fla. 1991).

In re Forfeiture of Approximately \$49,900.00, 432 So.2d 1382 (Fla. 4th DCA 1983), abrogated sum nom. Department of Law Enforcement v. Real Property, 588 So.2d 957 (Fla. 1991).

Hollywood, Inc. v. Broward County, 431 So.2d 606 (Fla. 4th DCA), review denied, 440 So.2d 352 (Fla. 1983).

Merrill Lynch, Pierce, Fenner & Smith v. Melamed, 405 So.2d 790 (Fla. 4th DCA 1981), approved, 476 So.2d 140 (Fla. 1985).

Hayslip v. Douglas, 400 So.2d 553 (Fla. 4th DCA 1981).

Hollywood, Inc. v. Zinkil, 403 So.2d 528 (Fla. 4th DCA 1981).

Byrd v. Hustler Magazine, Inc., 433 So.2d 593 (Fla. 4th DCA 1983), review denied, 443 So.2d 979 (Fla. 1984).

Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Scheller, 1 F.L.W.Supp. 25 (Fla. 15th Cir. Ct. 1992).

Palm Court Inc. v. Durham, 47 Fla.Supp.2d 135 (Fla. 15th Cir. Ct. 1991).

REVERSALS

Michaud-Berger v. Hurley, 607 So.2d 441 (Fla. 4th DCA 1992)(I ruled that the asserted ground for disqualification had been waived and that the motion was untimely. The appellate court disagreed and reversed.)

Gepetto's Tale O' The Whale of Fort Lauderdale, Inc. v. Landmark First Nat'l Bank of Fort Lauderdale, 481 So.2d 1282 (Fla. 4th DCA), quashed, 498 So.2d 920 (Fla. 1986)(I voted to deny a creditor's right to a deficiency judgment because of failure to comply with UCC's notice requirement. Florida Supreme Court ruled that the creditor was entitled to obtain a deficiency judgment if it could establish that the fair market value of the collateral was less than the debt.)

Wolmer v. Chrysler Corp., 474 So.2d 834 (Fla. 4th DCA 1985), quashed, 499 So.2d 823 (Fla. 1986)(I voted to reinstate a jury's verdict for punitive damages because I believed there was sufficient evidence to require submission of the issue to the jury. The Florida Supreme Court, however, ruled that the evidence did not show that Chrysler had actual knowledge that the vehicle's fuel system was inherently dangerous and, therefore, the trial court was correct in granting defendant's motion for a directed verdict on punitive damages.)

Dania Jai-Alai Palace, Inc. v. Sykes, 425 So.2d 594 (Fla. 4th DCA 1982), quashed in part, 450 So.2d 1114 (Fla. 1984)(I voted to support a rule which would permit a person to pierce a corporate veil on a showing of total domination of a subsidiary by a parent corporation. The Florida Supreme Court overruled, holding that a corporate veil may not be pierced absent a showing of improper conduct.)

Sisk v. General Builders Corp. of Fort Lauderdale, Inc., 438 So.2d 65 (Fla. 4th DCA 1983), quashed, 461 So.2d 104 (Fla. 1984)(District Court applied Dania Jai-Alai, supra, and the Supreme Court reversed.)

Bova v. State, 392 So.2d 950 (Fla. 4th DCA 1980), disapproved in part, 410 So.2d 1343 (Fla. 1982)(I voted to uphold a trial judge's ruling that defense counsel could not talk with the defendant about the case during a fifteen minute recess in the midst of cross-examination. The Florida Supreme Court overruled, holding that no matter how brief the recess, a defendant in a criminal proceeding must be able to consult with his or her attorney.)

Greenman v. Greenman, 384 So.2d 1303 (Fla. 4th DCA 1980)(reversed with directions to clarify the term "family support" by specifying amount of alimony and amount of child support)

Hiles v. Auto Bahn Federalization, Inc., 555 So.2d 1218 (Fla. 4th DCA 1989), review denied, 562 So.2d 345 (Fla. 1990)(Appellate court found that legal and equitable claims were intertwined and, therefore, reversed trial court's holding that jury verdict was advisory in shareholder's derivative action.)

Hurley v. Conklin, 409 So.2d 148 (Fla. 4th DCA 1982), approved, 428 So.2d 654 (Fla. 1983)(Appellate court reversed my holding that the doctrine of implied warranty of fitness extended to the sale of residential lots with seawalls.)

Palm Beach Leisureville Community Ass'n, Inc. v. Raines, 398 So.2d 471 (Fla. 4th DCA 1981), approved, 413 So.2d 30 (Fla. 1982)(I awarded attorney's fees at the conclusion of condominium litigation. Appellate court ruled that the statute authorizing fees was inapplicable in this instance.)

Lowen Air Conditioning, Inc. v. Small, 397 So.2d 414 (Fla. 4th DCA 1981)(I granted a motion to dismiss for lack of prosecution when there had been no record activity for a year and when the appellant failed to file anything in writing demonstrating good cause why the case should not be dismissed. The appellate court reversed, holding that I should have taken judicial notice of an order staying the case until attorney's fees had been paid in another case.)

Liberty Mutual Ins. Co. v. Magee, 389 So.2d 1090 (Fla. 4th DCA 1980)(I denied a motion to transfer for improper venue. The appellate court reversed, holding that the motion was facially sufficient to require transfer to Glades County.)

Kaylor v. Kaylor, 390 So.2d 752 (Fla. 4th DCA 1980)(The former wife raised three points on appeal. The appellate court affirmed on two points, but reversed the trial court's holding that the husband should be responsible for one-half of the wife's attorney's fees. The appellate court ruled that the husband should pay all of the wife's attorney's fees.)

Slingerland v. Hurley, 388 So.2d 587 (Fla. 4th DCA), dismissed, 394 So.2d 1152 (Fla. 1980)(Either I, or a predecessor judge, approved a special master's finding that a managing partner's expenditure was justified as a necessary cost of doing business. The appellate court reversed, finding that the expenditure constituted improper self-dealing.)

Aetna Life & Casualty Co. v. Little, 384 So.2d 213 (Fla. 4th DCA 1980)(The appellate affirmed in part and reversed in part. The court ruled that I should have granted a directed verdict in favor of Aetna on one issue.)

Turner v. Turner, 383 So.2d 700 (Fla. 4th DCA), review denied, 392 So.2d 1381 (Fla. 1980) (Affirmed in part and reversed in part. I ruled that the former husband was not entitled to a modification of alimony because of a lack of a change of circumstances. The appellate court ruled there was a sufficient change of circumstances to justify modification but, in this case, modification could not be granted because the husband had waived his right to seek modification.)

John Crescent, Inc. v. Schwartz, 382 So.2d 383 (Fla. 4th DCA), cert. denied, 389 So.2d 1113 (Fla. 1980) (I set aside a judicial sale of a family home where the equity was \$30,000 and where the sale price was \$5,000, finding that the wife, who accepted service of process, never informed her husband and failed to file a responsive pleading, suffered from an emotional condition of unresolved anxiety. The appellate court reversed, finding that the wife's condition did not constitute "mistake, accident or surprise" within the meaning of the appropriate court rule.)

DeFilippis v. DeFilippis, 378 So.2d 325 (Fla. 4th DCA 1980) (I required the husband and wife to split the cost of a special master's fee. The appellate court reversed, holding that a prior order requiring the husband to pay all costs governed.)

State Farm Mut. Auto. Ins. Co. v. Eberhardt, 374 So.2d 1113 (Fla. 4th DCA 1979) (Appellate court ruled that set-off principles did not apply in this case.)

FEDERAL OR STATE CONSTITUTIONAL ISSUES

Zerweck v. State Comm'n on Ethics, 409 So.2d 57 (Fla. 4th DCA 1992) (upholds constitutionality of Florida's code of ethics)

Fields v. Zinman, 394 So.2d 1133, 1138 (Fla. 4th DCA 1981), review denied, 417 So.2d 329 (Fla. 1982)(Hurley, J., concurring)(waiver of filing fee for indigent appellant)

Proctor v. City of Coral Springs, 396 So.2d 771, 772 (Fla. 4th DCA)(Hurley, J., concurring)(discussing the right to freedom of association), review denied, 402 So.2d 608 (Fla. 1981).

DeLisi v. Bankers Ins. Co., 436 So.2d 1099 (Fla. 4th DCA 1983)(application of the Fifth Amendment privilege against self-incrimination in the context of a civil discovery deposition)

State v. Breland, 421 So.2d 761 (Fla. 4th DCA 1982)(application of the Double Jeopardy Clause in the context of an allegation that the trial court provoked defense counsel into moving for a mistrial)

State v. Phoenix, 428 So.2d 262 (Fla. 4th DCA 1982), approved, 455 So.2d 1024 (Fla. 1984)(whether police officers who conduct covert surveillance outside their jurisdiction may make a valid citizen's arrest while in a marked police car and after a show of authority)

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

None other than the appointed positions of assistant county solicitor and assistant state attorney which are set forth in the answer to question 6.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

Hon. John Helm Pratt
U.S. District Judge for the District. of Columbia
U.S. Courthouse
Washington, D.C. 20001
August 1968 - July 1969

Hon. Roger Robb
U.S. Circuit Judge for the D.C. Circuit
U.S. Courthouse
Washington, D.C. 20001
August 1969 - October 1969

2. whether you practiced alone, and if so, the addresses and dates;

I did not practice alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

February 1, 1970 - December 31, 1972
Assistant County Solicitor
Office of the County Solicitor for Palm Beach
County, Florida;

(On January 1, 1973, the office of county solicitor, which was responsible for all criminal prosecutions except capital cases, was abolished by constitutional amendment. The staff and prosecutorial responsibilities were transferred to the office of the state attorney.)

January 1, 1973 - December 1, 1975
Executive Assistant State Attorney
Office of the State Attorney for the Fifteenth
Judicial Circuit of Florida
Palm Beach County Courthouse
West Palm Beach, Florida 33401

December 2, 1975 - September 5, 1977
County Court Judge for Palm Beach County
Palm Beach County Courthouse
West Palm Beach, Florida 33401

September 6, 1977 - October 18, 1979
Circuit Judge, Fifteenth Judicial Circuit
Palm Beach County Courthouse
West Palm Beach, Florida 33401

October 19, 1979 - February 9, 1986
District Judge, Fourth District Court of Appeal
1525 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33401

February 10, 1986 - Present
Circuit Judge, Fifteenth Judicial Circuit
Palm Beach County Courthouse
West Palm Beach, Florida 33401

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

February 1, 1970 - December 31, 1972
 Assistant County Solicitor for Palm Beach County
 Until its abolition by state constitutional amendment on December 31, 1972, the county solicitor's office was responsible for all criminal prosecutions with the exception of capital cases. As an assistant county solicitor, I prosecuted misdemeanor and felony cases in the Palm Beach County Criminal Courts of Record. Each assistant carried a case load of between fifty and seventy-five cases which were resolved by plea or trial.

January 1, 1973 - December 1, 1975
 Executive Assistant State Attorney, Fifteenth Judicial Circuit of Florida
 In this position, I carried a reduced case load and performed the following administrative duties: (1) professional staff recruitment, (2) chaired the office's compensation review committee and (3) handled other administrative responsibilities as assigned by the state attorney. During this period I appeared in court frequently.

December 2, 1975 - September 5, 1977
 County Court Judge for Palm Beach County, Fla.
 I served in the civil division of the court, handling small claims, landlord-tenant matters and civil cases under \$5,000. In early 1977, I served as the first judge to staff an annex courthouse in Delray Beach, Florida. There, in addition to county court jurisdiction, I served as an acting circuit judge, handling ex parte probate matters, uncontested marital litigation and pre-trial civil matters.

September 6, 1977 - October 18, 1979
 Circuit Judge for the Fifteenth Judicial Circuit
 of Florida
 I served in the civil division and handled civil
 and domestic litigation.

October 19, 1979 - February 9, 1986
 District Judge for the Fourth District Court of
 Appeal of Florida
 All appeals from the circuit court, with the
 exception of death penalty appeals, are directed
 to Florida's five mid-appellate courts. Thus,
 while serving in this position, I handled a wide
 range of civil and criminal appeals.

February 10, 1986 - Present
 Circuit Judge for the Fifteenth Judicial Circuit
 of Florida
 I served in the civil division, handling civil
 and domestic relations litigation until early
 1988 when I was elected by the judges of the
 court to serve as chief judge. I held this
 position for approximately five years until April
 of 1993. In addition to handling a limited civil
 and criminal case load, my responsibilities
 included: (1) involvement with the construction
 of two courthouses (one housing 59 courtrooms),
 (2) management of a forty-six-judge court, (3)
 serving as the court's liaison with county
 government, bar associations and community
 organizations. Following my tenure as chief
 judge, I was assigned to the court's family
 division in which I am presently serving.

2. Describe your typical former clients, and mention
 the areas, if any, in which you have specialized.

I prosecuted on behalf of the State of Florida
 and, thus, represented crime victims and police
 agencies. I developed a specialty in fraud
 prosecutions.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

February 1970 - December 1972

I appeared in court on an almost daily basis.

January 1973 - December 1975

I appeared in court frequently and, in addition, handled various administrative responsibilities.

2. What percentage of these appearances was in:

(a) federal courts -- 0%

(b) state courts of record -- 100%

(c) other courts -- 0%

3. What percentage of your litigation was:

(a) civil -- 0%

(b) criminal -- 100%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I would estimate that I tried 100 - 200 cases to verdict, the overwhelming majority as sole counsel.

5. What percentage of these trials was:

(a) jury -- 100%

(b) non-jury -- 0%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; described in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;

(b) the name of the court and the name of the judge or judges before whom the case was litigated; and

(c) the individual name, addresses and telephone numbers of co-counsel and of principal counsel for each of the other parties.

(Note: While working as a prosecuting attorney between 1970 and 1975, I appeared in court on an almost daily basis. My time was spent negotiating and presenting proposed dispositions to the court and in trying cases to verdict. Court records from this period are not computerized and, consequently, the following list constitutes my best recollection.)

State v. Ben Amos Chaney, Circuit Court for the Fifteenth Judicial Circuit of Florida (1972), Case Numbers: 72-2680 and 72-2681; charge: first degree murder (murder of two Florida Atlantic University students); disposition: guilty as charged; judge: Hon. Joseph Metzger (deceased); prosecutors: David H. Bludworth (first chair)(address: 3106 Medinah Circle, Lake Worth, Florida 33467, telephone: (407) 967-9209), Daniel T. K. Hurley (second chair); defense counsel: William Kunstler, Esq., c/o Center for Constitutional Rights, 666 Broadway, 7th Floor, New York, N.Y. 10012, telephone: (212) 614-6464, Hon. Alcee Hastings, M.C., U.S. House of Representatives, Washington, D.C. 20515, telephone: (202) 225-1313, and Hon. Edward Rodgers, Palm Beach County Courthouse, West Palm Beach, Florida 33401, telephone: (407) 355-2280; disposition on appeal: affirmed, see Chaney v. State, 280 So.2d 730 (Fla. 4th DCA), cert. denied, 286 So.2d 10 (Fla. 1973).

State v. Dexter Coffin, Circuit Court for the Fifteenth Judicial Circuit of Florida (1973 - 1974), Case Number 73-1670; charge: grand larceny (theft of proceeds from boat sale); disposition: guilty as charged; judge: Hon. Russell H. McIntosh (deceased); prosecutor: Daniel T. K. Hurley, Esq.; defense counsel: Charles Nugent, Esq., and David L. Roth, Esq., Flagler Center Tower, 505 So. Flagler Drive, West Palm Beach, Florida 33401, telephone: (407) 655-5200.

State v. Minnie Mae Camper, Circuit Court of the Fifteenth Judicial Circuit of Florida (1974 - 1975); Case Number: 74-2176; charge: first degree murder (shooting of a teenager); disposition: guilty of manslaughter; judge: Hon. Thomas E. Sholts (address: Palm Beach County Courthouse, West Palm Beach, Florida 33401, telephone: (407) 355-2427); prosecutors: Daniel T. K. Hurley, Esq. (first chair) and Mary E. Lupo, Esq. (second chair)(address: Palm Beach County Courthouse, West Palm Beach, Florida 33401, telephone: (407) 355-2256); defense counsel: Fred Daily, Esq., 302 Warren Drive, San Francisco, California 94131, telephone: (415) 681-7400.

State v. Theodore Taylor, Criminal Court of Record for Palm Beach County, Florida (1972); Case Number: 72C-1559; charge: second degree murder (stabbing); disposition: guilty of third degree murder; judge: Hon. Russell H. McIntosh (deceased); prosecutor: Daniel T. K. Hurley, Esq.; defense counsel: George E. Barrs, Esq., (address: Office of the Public Defender, 421 Third Street, West Palm Beach, Florida 33401, telephone: (407) 355-7701); disposition on appeal: affirmed, Taylor v. State, 313 So.2d 511 (Fla. 4th DCA 1975).

State v. Marie Cardenas Sanders, Criminal Court of Record for Palm Beach County (1971 - 1972); Case Number: 71-737; charge: grand theft and violation of the deceptive trade practices act (fraud by an alleged marriage counselor); disposition: guilty as charged; judge: Hon. Russell H. McIntosh (deceased); prosecutor: Daniel T. K. Hurley, Esq.; defense counsel: Robert Foley, Esq., (address: 406 No. Dixie Highway, West Palm Beach, Florida 33401, telephone: (407) 832-1744).

In Florida, the state is normally represented on appeal by the Office of the Attorney General. On occasion, however, I did some appellate work. The following are three examples.

State v. Profera, 239 So.2d 867 (Fla. 4th DCA 1970)(defines probable cause for warrantless search).

State v. Henderson, 253 So.2d 158 (Fla. 4th DCA 1971)(reverses suppression of evidence where error was harmless).

State v. Simpson, 326 So.2d 54 (Fla. 4th DCA 1976)(ruling reversed for lack of evidentiary basis).

As an addendum to question 18 I am providing a list of attorneys who have appeared before me in significant litigation.

Heller v. Heller, CD-92-1255-FC (Fla. 15th Cir. Ct)

Louisa Smith-Adam, Esq.
625 North Flagler Drive, Suite #505
West Palm Beach, Florida
(407) 655-1727

Steven L. Winig, Esq.
1601 Forum Place, Suite #301
West Palm Beach, Florida 33401
(407) 697-7877

Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Scheller, 1 F.L.W.Supp. 25 (Fla. 15th Cir. Ct. 1992)

Larry S. Stewart, Esq.
44 W. Flagler Street, Suite #1900
Miami, Florida 33130
(305) 686-6300

Eugene E. Stearns, Esq.
1500 W. Flagler Street, Suite 2200
Miami, Florida 33130
(305) 789-3200

Palm Court Inc. v. Durham, 47 Fla.Supp.2d 135 (Fla. 15th Cir. Ct. 1991)

Gerald Richman, Esq.
175 N.W. First Avenue
Miami, Florida 33128
(305) 373-4000

Michael Hanzman, Esq.
P. O. Box 19658
Miami, Florida 33101
(305) 539-8400

Greg William McClosky, Esq.
5355 Town Center Road, Suite #901
Boca Raton, Florida 33486
(407) 368-9200

Emanuel Duke, Esq.
2400 Main Place Tower
Buffalo, New York 14202
(716) 855-1111

Allen P. Reed, Esq.
1428 Brickell Avenue
Miami, Florida 33131
(305) 372-2073

John R. Gillespi, Jr., Esq.
200 E. Las Olas Blvd., Suite #1900
Fort Lauderdale, Florida 33301
(305) 728-3420

Craig E. Stein, Esq.
1221 Brickell Avenue
Miami, Florida 33131
(305) 579-0737

Peter W. Homer, Esq.
3400 CenTrust Financial Ctr.
100 S.E. Second Street
Miami, Florida 33131
(305) 350-5100

Gary M. Carmen, Esq.
701 Brickell Avenue, Suite #16
Miami, Florida 33131
(305) 789-8900

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

In 1988 I was appointed to serve as the vice chair of the Florida Supreme Court Commission on Criminal Discovery. The commission held hearings throughout the state and provided recommendations to the Florida Supreme Court regarding appropriate discovery in criminal litigation.

From 1989 to 1991, I served on the executive committee of the Florida Conference of Circuit Judges. The conference's primary activity is judicial education. By statute, however, it is also charged with the responsibility of advising the Legislature on issues concerning the administration of justice.

As indicated in my response to question 17(b), I was elected unanimously on three occasions by the forty-six judges in Palm Beach County to serve as chief judge of the Fifteenth Judicial Circuit. During my five-year tenure, I was involved with many projects to improve the administration of justice in our community. These include the construction of two new courthouses, the establishment of a victim-witness program to coordinate discovery in criminal cases, computerization of court reporting in the criminal courts, and establishment of a jury management project.

Since 1987, I have served as a faculty member of the Florida College for New Judges. I have taught courses in family litigation, judicial methodology, and judicial disqualification.

In 1972, while working as an assistant county solicitor, I visited several out-of-state municipal and county governments to view their consumer protection departments. I then helped to draft Palm Beach County's first consumer protection ordinance which created a county consumer protection department.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

I have participated in a state-approved deferred compensation plan in which pre-tax dollars are invested with Aetna Insurance Company. The invested monies can be withdrawn without penalty for limited purposes. Otherwise they cannot be withdrawn until age 65.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

I do not anticipate any but, in all instances, would follow the appropriate statutory mandates and canons of judicial ethics.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court?

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

Please see form AO-10 which is attached.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

See attachment.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Yes. In 1972, I assisted William Staab, Esq. who was a candidate for state attorney for the Fifteenth Judicial Circuit of Florida. The primary election was held in September, 1972. My role in the campaign was that of advisor.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

The Florida Constitution prohibits judges from engaging in the practice of law. In addition, the Canons of Judicial Ethics place other restrictions on a judge's ability to engage in certain pro bono activities. With these limitations in mind, I have participated on a regular basis in law day educational activities in our county's schools. Also, in my capacity as chief judge of the Fifteenth Judicial Circuit, I regularly met with civic and community organizations to discuss the administration of justice in our county.

In the early 1980s, while serving on the Fourth District Court of Appeal, I acted as one of three judges who hosted a meeting of law firm hiring partners to discuss minority recruitment and hiring. At that time, few major law firms in Palm Beach County had African-American associates and young attorneys were leaving the area because of their inability to secure employment. Shortly after the meeting, several firms hired minority associates. I believe this project was instrumental in breaking the barrier to minority hiring in our legal community.

In 1992, I served on the board of directors for Hope House of the Palm Beaches, an organization providing housing for AIDS victims. I resigned when the board became more active in fundraising, an activity which is prohibited by the canons of judicial ethics.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies?

With the exception of cub scouts and boy scouts, the answer to this question is "no, never."

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

Senator Bob Graham established a Federal Judicial Nominating Commission for Florida. The 37-member commission is divided into three subcommittees to consider applications for vacancies in the northern, middle and southern districts of Florida. In 1993, the commission advertised six district court vacancies, two in the middle district and four in the southern district.

I submitted an application, and was invited to interview with the subcommittee for the southern district of Florida. The interview was open to the public and lasted for a half hour. At the conclusion of its deliberations, the commission nominated nine individuals.

Each of the nine nominees was invited to interview with Senator Graham. Again, the interview lasted a half hour. Shortly thereafter, I was notified that Senator Graham had recommended my name to the President for nomination to the U.S. District Court for the Southern District of Florida. Since then, I have met with representatives of the Department of Justice and with a member of the American Bar Association's Committee on the Federal Judiciary.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question?

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;'

c. A tendency by the judiciary to impose broad affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Under our tripartite system of government, the enactment of policy into law is the responsibility of the legislative branch. The judicial branch interprets and applies the law. To this end, judges must follow well-established principles of statutory construction. Statutes which are clear and unambiguous must be given their plain, ordinary meaning and applied as written. When the meaning is unclear, courts should make all appropriate efforts, including consideration of relevant legislative history, to discern the intent of the legislature and achieve the intended result.

Judges are trained to find facts and apply established remedies. Development of legislative policy and its execution are the domain of the other branches. To insure that the court fulfills its responsibility and, at the same time, respects the prerogatives of the coequal branches, judges must adhere to the constitutional requirement that the issue presented be framed in the context of a "case or controversy." Moreover, case law has developed definitions for standing and ripeness to insure that parties have a cognizable interest in the litigation and that it presents an issue which is ready for resolution. Judicial restraint is another doctrinal basis to prevent usurpation of executive or legislative responsibilities.

It is axiomatic that judges are not freewheeling agents. The doctrine of stare decisis -- the rule that judges are bound by precedent from higher courts -- promotes predictability and constancy in the law. This is a bedrock principle in our jurisprudence. Irrespective of personal feelings concerning the efficacy of a rule or holding, a judge must follow precedent and apply the law.

A particularly difficult area for judges is the crafting of remedies where governmental action is found to be violative of the constitution. It is in this context that courts have been criticized most for interfering with traditional responsibilities of other branches. Judges, especially trial judges acting alone, must be acutely sensitive to this concern. In the final analysis, however, it is the court's obligation to enforce the constitution by affording appropriate relief.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks	17	670	52	Notes payable to banks—secured		0	
U.S. Government securities—add schedule		0		Notes payable to banks—unsecured		0	
Listed securities—add schedule		0		Notes payable to relatives		0	
Unlisted securities—add schedule		0		Notes payable to others		0	
Accounts and notes receivable:		0		Accounts and bills due		200	00
Due from relatives and friends		0		Unpaid income tax		0	
Due from others		0		Other unpaid tax and interest		0	
Doubtful		0		Real estate mortgages payable—add schedule	120	000	00
Real estate owned—add schedule	185	000	00	Chattel mortgages and other liens payable		0	
Real estate mortgages receivable		0		Other debts—itemize:		0	
Autos and other personal property	20	000	00	Auto Lease:			
Cash value—life insurance		0		34 payments @ \$395.00	13	430	00
Other assets—itemize:		0					
Aetna Deferred Comp. Act.	65	397	03				
State Retirement Fund	6	991	39				
				Total liabilities	133	630	00
				Net Worth	161	428	94
Total Assets	295	058	94	Total liabilities and net worth	295	058	94
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, cosigner or guarantor		0		Are any assets pledged? (Add schedule.)	NO		
On leases or contracts		0		Are you defendant in any suits or legal actions?	NO		
Legal Claims		0		Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax		0					
Other special debt		0					

Schedule "A"

Real Estate Owned
Condominium Residence
3610 So. Ocean Blvd., #405
So. Palm Beach, Florida 33480

Schedule "B"

Real Estate Mortgages Payable
Interfirst Federal Savings Bank
Post Office Box 1323
Ann Arbor, MI 48106-1323
Acct. No. 160 ML 005 1074547

AD-10
Rev. 1/93

FINANCIAL DISCLOSURE REPORT

Report Required by the Ethics
Reform Act of 1989, Pub. L. No.
101-194, November 30, 1989
(5 U.S.C.A. App. 6, §§101-112)

1. Person Reporting (Last name, first, middle initial) Hurley, Daniel, T.K.	2. Court or Organization Nominated to: U.S. Dist. Ct. Southern Dist. of Florida	3. Date of Report 11/12/93
4. Title (Article III judges indicate active or senior status; Magistrate judges indicate full- or part-time) Active	5. Report Type (check appropriate type) <u>X</u> Nomination, Date <u>11/10/93</u> ___ Initial ___ Annual ___ Final	6. Reporting Period Jan. 1, 1993 to Nov. 12, 1993
7. Chambers or Office Address County Courthouse West Palm Beach, Florida 33401	8. On the basis of the information contained in this Report, it is, in my opinion, in compliance with applicable laws and regulations ___ Reviewing Officer Signature _____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each section where you have no reportable information. Sign on last page.

I. POSITIONS. (Reporting individual only; see pp. 7-8 of Instructions.)

POSITIONNAME OF ORGANIZATION/ENTITY
☒ NONE (No reportable positions)

II. AGREEMENTS. (Reporting individual only; see p. 8-9 of Instructions.)

DATEPARTIES AND TERMS
☐ NONE (No reportable agreements)

1970 - 1993 I have been employed by the State of Florida for twenty-three
years and, therefore, have vested retirement benefits.

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 9-12 of Instructions.)

DATE
(Honoraria only)SOURCE AND TYPEGROSS INCOME
(yours, not spouse's)
☐ NONE (No reportable non-investment income)

1	State of Florida retirement benefits (I have not decided whether to draw these prior to age 65.)	\$
2		\$
3		\$
4		\$
5		\$

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting
Daniel T. K. HurleyDate of Report
11/12/93

IV. REIMBURSEMENTS and GIFTS -- transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate reportable reimbursements and gifts received by spouse and dependent children, respectively. See pp.13-15 of Instructions.)

SOURCE

DESCRIPTION

☒ NONE (No such reportable reimbursements or gifts)

1		
2		
3		
4		
5		
6		
7		
8		

V. OTHER GIFTS. (Includes those to spouse and dependent children; use the parentheticals "(S)" and "(DC)" to indicate other gifts received by spouse and dependent children, respectively. See pp.15-16 of Instructions.)

SOURCE

DESCRIPTION

VALUE

☒ NONE (No such reportable gifts)

1		\$
2		\$
3		\$
4		\$

VI. LIABILITIES. (Includes those of spouse and dependent children; indicate where applicable, person responsible for liability by using the parenthetical "(S)" for separate liability of spouse, "(J)" for joint liability of reporting individual and spouse, and "(DC)" for liability of a dependent child. See pp.16-18 of Instructions.)

CREDITOR

DESCRIPTION

VALUE CODE*

☐ NONE (No reportable liabilities)

1	Mazda American Credit	36-Month Auto Lease	J
2	P.O. Box 111897		
3	Nashville, TN 37222-1897		
4			
5			
6			
7			

* VALUE CODES: J = \$15,000 or less K = \$15,001 to \$50,000 L = \$50,001 to \$100,000 M = \$100,001 to \$250,000
N = \$250,001 to \$500,000 O = \$500,001 to \$1,000,000 P = More than \$1,000,000

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

Daniel T. K. Hurley

Date of Report

11/12/93

VII. INVESTMENTS and TRUSTS -- income, value, transactions. (Includes those of spouse and dependent children; see pp. 18-27 of Instructions.)

A. Description of Assets (including trust assets) Indicate, where applicable, owner of the asset by using the parenthetical "(J)" for joint ownership of report- ing individual and spouse, "(S)" for separate ownership by spouse, "(DC)" for ownership by dependent child. Place "(X)" after each asset exempt from prior disclosure.	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1)	(2)	(1)	(2)	If not exempt from disclosure				
	Am- Code (A-B)	Type (e.g., div., rent or int.)	Value, Code (J-P)	Value Method, Code (Q-W)	(1) Type (A-F, buy, sell, mar- riage, redemp- tion)	(2) Date: Month Day	(3) Value, Code (J-P)	(4) Gain, Code (A-B)	(5) Identity of buyer/seller (if private transaction)
<input type="checkbox"/> NONE (No reportable income, assets, or transactions)									
1 Deferred Compensation Plan	C	div.	L	T	none				
2 Aetna Life Ins. Co.									
3									
4									
5									
6									
7									
8									
9									
10									
11									
12									
13									
14									
15									
16									
17									
18									
19									
20									

1 Income/Gain Codes:	A=\$1,000 or less (See Col. B1 & D4)	B=\$15,001 to \$50,000	C=\$2,501 to \$5,000	D=\$5,001 to \$15,000
2 Value Codes:	J=\$15,000 or less (See Col. C1 & D3)	K=\$15,001 to \$50,000	L=\$50,001 to \$100,000	M=\$100,001 to \$250,000
3 Value Method Codes:	Q=Appraisal (See Col. C2)	R=Book Value	S=Assessment	T=Cash/Market

FINANCIAL DISCLOSURE REPORT (cont'd)

Name of Person Reporting

Daniel T. K. Hurley

Date of Report

11/12/93

VIII. ADDITIONAL INFORMATION or EXPLANATIONS. (Indicate part of Report.)

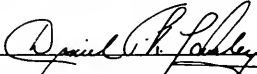
IX. CERTIFICATION.

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)(c), in the outcome of such litigation.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C.A. app. 7, § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature



Date 11/12/93

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C.A. APP. 6, § 104, AND 18 U.S.C. § 1001.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Judicial Ethics Committee
Administrative Office of the
United States Courts
Washington, DC 20544

ROY B. THOMPSON, P.C.
A PROFESSIONAL CORPORATION
888 AMERICAN BANK BUILDING
621 N.W. MORRISON
PORTLAND, OREGON 97205-3811
TELEPHONE (503) 224-0831

4 I.L.M. IN TAXATION
7 ALSO ADMITTED IN NEW YORK
FACSIMILE NO.
(503) 222-7800

ROY B. THOMPSON IS

March 2, 1994

Senator Joseph Biden
Senate Judiciary Committee
United States Senate
Washington, DC 20510

FAX (202) 224-9516

Re: Ancer Haggerty

Dear Senator Biden:

I am writing to express my deepest opposition to the appointment of Judge Ancer Haggerty to the Federal bench. It is my understanding that Judge Haggerty's nomination is scheduled to be considered on March 3, 1994. It is also my understanding and intention that these comments will be inserted into the Congressional Record. If for some reason the hearing is postponed until a later date, I specifically request the opportunity to appear and testify in person.

Judge Haggerty is currently a state Circuit Court judge in Portland, Multnomah County, Oregon. He has been nominated for a position on the United States District Court for the District of Oregon.

My objections to Judge Haggerty are twofold. First, I am convinced that he does not have the intellectual abilities necessary in a federal judge. Secondly, I was personally a litigant in a trial before Judge Haggerty wherein he kept a crucial document out of evidence in the jury portion of the trial in order to ensure that the final result was against me.

Appeal Record

Many months ago, I had a LEXIS search done of Judge Haggerty's record of appeals while he has been on the Circuit Court bench. At that time, his decisions had been appealed four times, with three reversals.¹ Such a record indicates that his logic and thought processes while sitting on the bench are to be questioned. I do not know if there have been additional appeals of his decisions or not.

¹ The one time Judge Haggerty was upheld was when he had performed the ministerial act of entering an arbitration award as a judgment.

Senator Joseph Biden
Senate Judiciary Committee
March 2, 1994
Page 2

Bar Preference Poll

Judge Haggerty was not the first choice of the members of the Oregon State Bar when he was initially appointed to the state court bench. However, for political reasons he was named by the Governor and confirmed. He came from one of the larger law firms in Portland, with 175 members at the time. In the preference poll he received just over 300 votes - enough to put him in second place.

Personal Experience

I was sued by former clients over a series of fee agreements. They sued to rescind the second and third (written) agreements, and for breach of the first oral agreement. However, there was a fourth agreement, also in writing, that expressly superseded all prior written and oral agreements.

In the first phase of trial (to the court), Judge Haggerty granted rescission of the second and third agreements. The fourth agreement was introduced into evidence by the plaintiffs (my former clients), but there was no ruling with regard to it.

In the second phase of trial (before a jury) for breach of the initial oral fee agreement, Judge Haggerty specifically excluded any mention of the fourth written fee agreement, even though it superseded the contract being sued upon. The jury was never allowed to know about the only operative contract.

It is not a difficult legal concept to master: a later written contract supersedes prior oral and written agreements, especially where it contains a supersession clause. For most attorneys and judges, this principle of contract law is obvious. Judge Haggerty either did not understand this simple principle or he intentionally altered the outcome of the trial.

At the end of the second phase of trial, the jury returned a verdict that awarded \$201,000 to me from the plaintiffs.

Finally, in a third phase of trial, Judge Haggerty entered a judgment against me for a ruinous amount, based upon a supposed breach of a superseded contract. As an indication of Haggerty's lack of confidence in the judgment he was entering, some funds sitting in escrow in my name were ordered to remain there pending the outcome of the appeal of the judgment. On the other hand, Judge Haggerty refused to stay collection on the judgment that was entered.

These are matters of public record. The record may be found in Multnomah County Circuit Court, Case No. 9011-07573, and pending on appeal after oral argument at the

Senator Joseph Biden
Senate Judiciary Committee
March 2, 1994
Page 3

Oregon Court of Appeals, Docket No. CA A74864.

I was later informed that Judge Haggerty told someone that he proceeded as he did in order to try to force me to settle the case. In other words, he ignored legal principles and excluded crucial evidence in order to alter the result of the trial. The result was a \$268,000 judgment against me. Whether or not that judgment will stand is now a matter for the Oregon Court of Appeals. Such an attitude demonstrates both a lack of intellectual integrity, but also a lack of the fundamental fairness and impartiality needed in any judge, whether state or federal.

In conclusion, Judge Haggerty has neither the intellectual abilities nor the fundamental integrity necessary to be a United States District Court judge. His appeal record and lack of experience (four years on the state court bench) speak for themselves. Placing Judge Haggerty on the federal bench will lead to continued illogical and unprincipled rulings, from a position where he has the job for life. At least as a state court judge in Oregon, he has a limited term and can be removed from office at the next election. It goes without saying, but I will say it anyway, that I do not expect this letter to affect Judge Haggerty's path to the federal bench. It is just that the objections need to be made for the record.

Respectfully submitted,

Roy B. Thompson

RB1/rep

cc: Judge Ancer Haggerty
via Federal Express
c/o Senate Judiciary Committee

MARTIN OLAV SABO
5th District, Minnesota

2336 Rayburn House Office Building
Washington, D.C. 20515
(202) 225-4755

462 Federal Courts Building
110 South 4th Street
Minneapolis, Minnesota 55401
(612) 348-1649



Congress of the United States
House of Representatives
Washington, D.C. 20515

COMMITTEE ON BUDGET
Chairman

COMMITTEE ON APPROPRIATIONS

Subcommittees
Defense Transportation
Treasury Postal Service General Government
DEPUTY MAJORITY WHIP

March 3, 1994

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

We are writing in strong support of our friend and colleague, The Honorable Michael James Davis, for confirmation to the position of Judge of the United States District Court, District of Minnesota.

We applaud President Clinton for his forthrightness in nominating Judge Davis to fill this important position on the United States District Court.

Judge Davis is highly respected in Minnesota where he has served as a Judge on the Hennepin County District Court since 1984. He has extensive litigation experience ranging from criminal defense to civil rights issues. He is a man of great integrity and character. We believe the President has chosen wisely in his nomination of Judge Davis. He will serve with distinction and be an asset to the Court. We urge you to confirm Judge Michael James Davis.

Sincerely,

James L. Oberstar

James L. Oberstar, M.C.

Bruce F. Vento

Bruce F. Vento, M.C.

Collin C. Peterson

Collin C. Peterson, M.C.

Martin Olav Sabo

Martin Olav Sabo, M.C.

Timothy J. Penny

Timothy J. Penny, M.C.

David Minge

David Minge, M.C.

NOMINATION OF DEVAL L. PATRICK, TO BE ASSISTANT ATTORNEY GENERAL FOR CIVIL RIGHTS, U.S. DEPARTMENT OF JUSTICE

THURSDAY, MARCH 10, 1994

**U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.**

The committee met, pursuant to notice, at 10:07 a.m. in Room SD-226, Dirksen Senate Office Building, Hon. Joseph R. Biden, Jr., chairman of the committee, and Hon. Edward M. Kennedy presiding.

Also present: Senators Metzenbaum, Leahy, Heflin, Simon, Feinstein, Moseley-Braun, Hatch, Thurmond, Simpson, Grassley, Specter, and Cohen.

OPENING STATEMENT OF CHAIRMEN BIDEN

The CHAIRMAN. The hearing will come to order, please.

Mr. Patrick, welcome.

Mr. PATRICK. Thank you, Mr. Chairman.

The CHAIRMAN. You have no idea how happy we are to see you here and to hopefully in short order, get this post filled and get underway.

Let me explain to you, Mr. Patrick, something my colleagues here and my colleague from the House as well, know all too well, how we proceed here. Senator Hatch and I will have opening statements and then what we are going to do since there has been a mad scramble to be associated with you, varying from Arizona to Massachusetts to introduce you.

Mr. PATRICK. It is early yet, Mr. Chairman.

The CHAIRMAN. Then we will ask our colleagues from both Houses to make their introductory remarks, after which we will invite you to make any introductory remarks you might have, and then we will get into questions.

Mr. PATRICK. Thank you.

The CHAIRMAN. The committee is convened to hear testimony on the nomination of Deval L. Patrick, of Massachusetts, to become Assistant Attorney General for the Civil Rights Division of the United States Department of Justice.

Over the past 5 decades, our Nation has made tremendous strides in making real our founding ideals of equality and liberty for all Americans. Through the work of thousands of brave men and women who fought in our courtrooms and in our streets and

our classrooms, minorities and women participate much more fully now than they did several decades ago.

Today, we find civil rights laws though, at a critical juncture. Unfortunately, in my view, the civil rights community and officials charged with enforcing the law have been forced to mark time in the struggle against reentrenchment. Longstanding voting rights remedies are now under attack in the Federal courts. Over discrimination has been replaced by subtle evasion of the law, making it increasingly difficult to convert formal legal equality into real social and economic equality. In addition, the Civil Rights Division faces new frontiers, such as the increasing recognition of violence as a threat to civil rights and increasing prominence of the issue of environmental equality.

The nominee to head the Civil Rights Division of the Department of Justice is superbly qualified to meet these challenges. Deval Patrick's excellence was evident early in his life. During junior high school, a school teacher recommended Mr. Patrick to a Boston-based program called A Better Chance which provided scholarship assistance to disadvantaged students.

Through A Better Chance, he attended Milton Academy in Massachusetts and then Harvard College. Mr. Patrick graduated cum laude from Harvard College in 1978. He then won a Rockefeller Fellowship to travel and study in the Third World and spent the next year in Sudan.

Upon returning to the United States, Mr. Patrick entered Harvard Law School, graduating in 1982. He clerked for Judge Stephen Reinhardt of the Ninth Circuit Court of Appeals and then began practice as a civil rights lawyer with the NAACP Legal Defense and Education Fund, a highly respected and involved organization that has done a great deal to better the rights of all people in this country over the last several decades.

In 1986, he entered private practice with the Boston law firm of Hill and Barlow. Now a partner in the firm, his commitment to equal justice continues. He devotes 30 percent of his time to pro bono civil rights work in his present capacity.

At this critical point, the Nation needs a lawyer like Mr. Patrick, in my view, who will bring his years of experience as a civil rights lawyer to the Department of Justice and reinvigorate the civil rights enforcement of this country. I will ask Mr. Patrick about his plans for the Division in light of these challenges. We must return, in my view, to the task begun earlier in our century but not yet completed—the effort to provide real, meaningful equal opportunity for every American without regard to race, gender or other immutable characteristics.

Welcome, Mr. Patrick, and I look forward to having a chance to have a discussion with you. Although we have had numerous discussions prior to this, I am looking forward to having one on the record.

Now, I will yield to my distinguished colleague from Utah, Senator Hatch.

OPENING STATEMENT OF SENATOR HATCH

Senator HATCH. Thank you, Mr. Chairman. I welcome you, Mr. Patrick to the committee.

Mr. PATRICK. Thank you, Senator.

Senator HATCH. I want to congratulate you on the honor of being selected for this very, very important position. I respect your personal and professional qualifications and your achievements, and I admire the service that you have rendered to your community. I enjoyed our conversation in my office. You are clearly a very fine human being.

Our Nation's struggle to achieve equal opportunity for all individuals is ongoing. The adoption of laws like the Civil Rights Act of 1964, the Voting Rights Act, the Fair Housing Act of 1968, the Americans With Disabilities Act and the Religious Freedom Restoration Act—these are all milestones in that struggle and their enactment was long overdue and they were achieved at great cost. The enactment of some of these laws came at the price of life itself, as the recent re-trial of the murder of Medgar Evers painfully reminds us. His was not the only life lost. These sacrifices were not in vain and must never be forgotten.

The vigorous and sensible enforcement of our Nation's civil rights laws remains very important for the kind of a Nation and people that we are. Whatever disagreements we may have in our society over the proper definition of discrimination or over the proper nature of remedies, we should not allow those disagreements to mask the fundamental fact that our country is a better place because of these laws. What we have in common as Americans far exceeds our differences.

I believe we are at a crossroads, though, in our civil rights policies. One road is marked by adherence to equality of opportunity for individuals as opposed to equality of results for groups. On this road, it is recognized that each of us should have equal protection of our laws without preference. This road is marked by the belief that equality and nondiscrimination are not defined by proportional representation, with every group accorded a percentage of jobs or other benefits reflecting a pre-determined numerical objective. Rather, equality and nondiscrimination are defined to mean opportunities accorded to individuals without regard to race, ethnicity or gender, letting the resulting numbers fall where they may.

The other road we face as a society is marked by a vision that equality and nondiscrimination are determined primarily by numerical results. This is the road of equality of result for groups. On this road, a lack of proportionality in representation among groups sometimes becomes the basis either for a finding of discrimination or the basis for voluntary preferences, for discrimination in reverse. In an increasingly diverse society, numerical straightjackets on opportunity are not only unfair, they are a recipe for social discord.

President Clinton has an historic opportunity on this important matter. President Clinton can take our Nation down the road of greater equal opportunity, and I believe that history's judgment of the President will rest in large measure or in large part on this issue and I think it rests there a lot more than many commentators think.

Which road will the President choose? Early policy signs are not encouraging, so I hope to learn from Mr. Patrick the direction in which he expects to take the principal Federal civil rights enforcement agency, if confirmed.

One final point, and it is certainly not directed at Mr. Patrick. I understand that in announcing Mr. Patrick's nomination the President indicated that any criticism of this nominee would suggest an anti-civil rights viewpoint. That, of course, depends on what the criticism is. Criticism of the advocacy of either reverse discrimination or the over-reliance on statistics to find discrimination, for example, if such criticism is applicable, is pro-civil rights, not anti-civil rights. I assume that the President did not mean to suggest that Mr. Patrick's views on civil rights are not subject to critical scrutiny.

I made it clear to you, Mr. Patrick, in our meeting in our office that I don't expect you and I to agree on everything. You have a tough job here. It is an important job. It is long overdue for it to be filled and, in all honesty, I think you are an excellent choice for this job, but we will ask some of these tough questions and they are not meant to give you a rough time in any way, shape or form. I respect you, admire you, and look forward to working with you.

MR. PATRICK. Thank you, Senator.

THE CHAIRMAN. Mr. Patrick, a man who has been relentless in encouraging me to schedule these hearings almost before I received the papers from the White House when we were able to legally schedule the hearings has been the senior Senator from Massachusetts, who is on his way. An equally strong advocate has been the junior Senator from Massachusetts, who is here, and I will yield now to him and we will defer to Senator Kennedy when he gets here. He chairs another major committee, as you know, and I believe that is why he is delayed now.

Senator Kerry, welcome, and then you and I are going to go up to the ABM Treaty, I suspect.

STATEMENT OF HON. JOHN F. KERRY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KERRY. Thank you very much, Mr. Chairman. I would ask unanimous consent that the full text of any comments be placed in the record.

Mr. Chairman, Senator Kennedy and I are really delighted to be able to introduce—though I think at this point he doesn't need much of an introduction, but to formally introduce to the committee Deval Patrick. We both had occasion to get to know him pretty well during the course of the selections for Federal judgeships and there was never a doubt in either of our minds that Deval Patrick would wind up here in front of this committee or introduced to Washington in some capacity very, very soon.

You have been through most of the sort of curricula background of the nominee. I would just like to say for Senator Kennedy and I we are particularly proud of the fact that A Better Chance did lure him from Chicago to Massachusetts, or Senator Simon might be sitting here alone without our ability to lay claim to the talents of Mr. Patrick.

You know in the course of his background what an extraordinary life he has led. There are some things that you didn't mention that I think are just worth putting in the record. He, at college, evidenced a continuing commitment to the kind of task which he is now being called on to perform at a much higher level. It began

with his own involvement in something called the Philip Brooks House Association, which works to improve the lot of poor people and to improve local communities.

During law school at Harvard, he headed the Harvard Legal Aid Bureau which provides free legal services to the community's neediest citizens. Then at Hill and Barlow, he has donated almost fully a third of his time as a practicing attorney to providing free services to indigent clients. He served as head of the New England Steering Committee for the NAACP Legal Defense Fund, served on the board of WGBH Television, and most recently Governor Weld has asked him to serve as vice chair of the State Judicial Nominating Council which helps select all the judges for our State. So I think you can see the continuing kind of public involvement and commitment that he has evidenced.

I think it is interesting to note that for the first time in 30 years, the Lawyers Committee for Civil Rights, which was founded by President Kennedy and which has never in those 30 years supported somebody for Federal office, has done so in the case of Deval Patrick, and I think that is its own statement of import.

If you really wanted to look at the personal qualities that he brings, which is really what we should take measure of here, he has a remarkable ability to bring people together and to deal with difficult issues. We know that this is a task that will deal with difficult, contentious issues, but he brings people together in the process of finding a solution to those problems.

It is interesting to note that he once sued the then-Governor of Arkansas, Governor Clinton, in a voting rights case. He got a handsome settlement on behalf of his clients and is here today as the nominee of now-President Clinton, and I think it underscores his ability to do difficult things but to leave good feeling behind him.

This is something that those who have worked with him understand, and they are obviously qualities that will be of enormous importance to a division in our Justice Department that has been, I think, governed by tension and has had great difficulties in creating a consensus behind some of the difficult choices we need to make in enforcing civil rights.

I might just comment in closing using the words of one of his cohorts in the law firm in Boston. Michelle Mansilla said that there is literally nobody she would rather work with than Deval because he genuinely gets involved in the world around him. I might add that she said that those who meet him never realize that Deval has, "that kind of background," which I quickly interpreted as a Yale man to mean that he is totally unlike any other Harvard graduate.

Mr. Chairman, this is an individual of really extraordinary capacity. It is quick and easy to be able to say that whenever we come to this table, but I must tell you there was absolutely no doubt in my mind when I had occasion to have a long conversation with him recently about the law, about civil rights, about the courts, about the tasks ahead of us, that he has a clear idea of what we should be doing and how we can best achieve it, and I think you will see that in the course of your inquiries here before the committee.

We are very proud of his citizenship and commitment and contributions to the State of Massachusetts, and we know that this city and this country will be very proud of what he accomplishes in this new role.

[The prepared statement of Senator Kerry follows:]

PREPARED STATEMENT OF SENATOR KERRY

Mr. Chairman and members of the Judiciary Committee, it is an honor to introduce my constituent, Deval Patrick, President Clinton's choice for Assistant Attorney General for Civil Rights.

Many of you may be familiar with Deval's impressive resume. Deval has outstanding Massachusetts credentials. He went to Milton for High School, he graduated cum laude from Harvard College, and he won the Ames Moot Court competition while obtaining his law degree at Harvard.

Deval has applied his skills throughout this country. Wherever he has gone, he has left a trail of good work, intense involvement, and great accomplishments. He lived in California when he clerked for Judge Stephen Reinhardt of the Ninth Circuit Court of Appeals, who describes him as "warm and compassionate; filled with unmatched conviction and ability." While a staff attorney for the NAACP Legal Defense Fund, he traveled across the southern states, arguing death penalty cases and voting rights cases and achieving great successes.

As a recipient of a Rockefeller Fellowship, Deval spent time in the Third World working for the United Nations.

But it is not only Deval's academic and professional background that is impressive. So is his social history. His father left his family when Deval was four years old. His family was supportive and loving, albeit poor. He went to elementary school just outside one of the toughest projects in America. Thanks to the discipline his mother taught him and to his innate talents, he became an outstanding young student. Were it not for the Boston-based program, "A Better Chance", which lured him from Chicago to Boston with a secondary school scholarship, it is possible that Senators Simon and Moseley-Braun would be introducing Deval today.

In 1986, Deval left the NAACP in New York, and returned to Massachusetts to work for Hill & Barlow. Deval decided to live in Milton, the town where he attended high school. He bought his dream house, enrolled his daughters Sarah and Catherine at Milton, joined the board of directors of that institution, and soon made partner at his firm.

If confirmed to the job the President has nominated him for, Deval will be leaving comfort in Boston for the stressful, demanding environment of Washington. He will have to take his daughters out of his alma mater; his wife may have to leave her job at Harvard; he may even have to sell his house. These are quite high prices to pay for a man who was worked hard his whole life. Michael Ricciuti, one of Deval's law partners and a nearby Milton resident, is precisely aware of the sweetness of Deval's world. "Willingness to forsake such a wonderful life," says Ricciuti, "is one of the truest signs of the impressive strength of Deval's character and his powerful eagerness to work for the common good."

Deval is an outstanding citizen our state is sorry to lose, if only temporarily. He has done terrific things for Massachusetts. In college he was a member and fundraiser for the Philip Brooks House Association, which works to improve poor, local communities. During law school he headed the Harvard Legal Aid Bureau, which provides free legal services to the community's neediest citizens. At Hill & Barlow, he donates almost a third of his time to providing free services to indigent clients. He has served as head of the New England Steering Committee for the NAACP Legal Defense Fund; he has served on the board of WGBH Public Television; and he was appointed by Governor Weld to be vice-chair of the state Judicial Nominating Council, the committee that helps select judges.

Deval's appeal extends far beyond state lines. Among his many national supporters are the Lawyers' Committee for Civil Rights, an organization founded by President Kennedy, which has never before in its 30 year history affirmatively endorsed a nomination for a federal executive position.

What is it about this man that is so unique and exceptional? Uniformly, those who have worked with him cite his honesty and candor. They also point to his rare ability to temper the fire of his commitment in order to respond to widely varying views, and to build consensus among disparate groups. He develops coalitions with genuine warmth and sincerity and arbitrates settlements with complete fairness. Evidence of his ability to engender positive feelings even from those he opposes is the fact that he once sued then-Governor Clinton of Arkansas on a voting rights

case. Even though Deval reached a solid settlement for his client, he has gone on to receive this nomination from President Clinton.

These abilities will be of great use to the Civil Rights Division. The jurisdiction of the division is filled with tension, and the leader must be a solid and stable force, capable of both inspiring those with whom he deals and calming the inevitable turmoils of civil rights enforcement. Deval is just such an individual, and far more.

I would like to close with the words of one of the people who has worked for Deval. Michelle Mansilla candidly states that there is nobody she would rather work with than Deval; she says that "he genuinely gets involved in the world around him." Ms. Mansilla adds that those who meet him "never realize Deval has that kind of background" which I interpret to mean that he is totally unlike a typical Harvard graduate.

My honorable colleagues, members of the Judiciary committee, it is my privilege to bring before you this very special individual, Deval Patrick.

The CHAIRMAN. Thank you, Senator.

Senator Simon, a member of this committee.

STATEMENT OF HON. PAUL SIMON, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator Simon. Thank you. I am very proud, along with my colleague, Senator Carol Moseley-Braun, that Deval Patrick was born in the city of Chicago, went to elementary school there, then unfortunately went astray and moved to Massachusetts, but he has overcome that handicap, Mr. Chairman—

The CHAIRMAN. In what respect? [Laughter.]

Senator SIMON [continuing]. With a distinguished career, and it combines both scholarship—he graduated cum laude from Harvard—and a sensitivity to the poor—Senator Kerry mentioned the fact that as a Harvard law student he headed the legal aid efforts in that area—and a practical, pragmatic approach to things.

Senator Hatch mentioned individual discrimination versus numbers. I don't think Senator Hatch was suggesting that numbers should just be totally ignored. If there is someone who hires 5,000 people and they happen to be all white male, I think there is a reason to look at numbers, but you don't just look at numbers alone. I think there is a fine line that has to be drawn here and I think our nominee has the ability to draw that kind of a line and do a superb job.

I think the President has made a great nomination and I am pleased to be here to join in introducing him to our committee.

The CHAIRMAN. Thank you very much, Senator.

Last, and clearly not least—and I apologize to our friend from the House. They say one of the longest walks is from one side of this Capitol to the other. I often think what we probably should do is always introduce our House colleagues first—it is a tradition to do otherwise here—because you have made the walk.

Thank you very much, Congressman Coppersmith, for coming over. I understand you are taking this walk permanently. You would rather walk, I understand, in the future from here to there than from there to here. Would you please give the committee the benefit of your relationship with Mr. Patrick? We welcome you.

STATEMENT OF HON. SAM COPPERSMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. COPPERSMITH. Thank you, Mr. Chairman and members of the committee. It is an honor for me to appear today to speak on

behalf of my friend, Deval Patrick, whom President Clinton has nominated to head the Civil Rights Division at the U.S. Department of Justice.

The struggle to ensure civil rights is ongoing and demands the kind of commitment and leadership that Deval has to offer this Nation. I have known Deval Patrick for over a dozen years since we both clerked for judges serving on the Ninth Circuit of the U.S. Court of Appeals. At that time and, of course, since I have seen many of the same characteristics noted by Judge Stephen Reinhardt, for whom Deval clerked, in a recent article he wrote for the Los Angeles Times.

Judge Reinhardt wrote, "As a law clerk, Deval demonstrated a strong commitment to fairness and decency, as well as a remarkable understanding of the relationship between law and justice." Deval will continue to demonstrate that commitment in his new position as head of the Civil Rights Division, just as he has done throughout his professional career.

Deval has superb credentials and experience for this important post. As a litigation attorney with the NAACP Legal Defense and Education Fund, he handled many complex and difficult civil rights cases and issues with skill, zeal and professionalism.

At the Legal Defense Fund, Deval specialized in voter access matters where he helped to ensure that minority and disadvantaged voters could exercise their right to register and vote. In private practice, Deval has remained committed to helping others by devoting approximately 30 percent of his time to pro bono cases, most of which related to civil rights issues.

Many who know of him share the inspiration I find in Deval's background. He overcame many hardships and with the help of his family and friends, but mostly through his own hard work, he achieved great success in school, at law school and professionally, preparing him for this opportunity to serve his country.

However, despite his successes, he has never forgotten how his achievements depended on getting a fair opportunity to succeed. He has dedicated his life to helping to give to others the same chance that he got. I have no question that as the Assistant Attorney General for Civil Rights, Deval will make every effort to break down the barriers of discrimination that hinder so many, so that all Americans can have an equal opportunity to succeed.

Shortly after the 1992 election, I received a note from Deval. He reminded me before I took my oath of office that, "The great challenge of the pursuit of public office is the performance which follows in office." Once the Senate confirms him, Deval will have the chance to show all of America how well he understands the responsibilities of public service through his performance in office.

Deval Patrick deserves to lead the Civil Rights Division of the Department of Justice. He brings tremendous personal and professional experience, as well as character, integrity, dedication and a not-to-be-underestimated sense of humor to a position which affects every American.

Finally, Mr. Chairman, I request that I could submit a copy of the article by Judge Reinhardt for the record at this time.

The Chairman. Without objection, it will be placed in the record. [See article referred to under submissions for the Record.]

[The prepared statement of Mr. Coppersmith follows:]

PREPARED STATEMENT OF CONGRESSMAN COPPERSMITH

Mr. Chairman, Members of the Committee: It is an honor for me to appear today to speak on behalf of my friend, whom President Clinton has nominated to head the Civil Rights Division at the U.S. Department of Justice. The struggle to ensure civil rights is ongoing and demands the kind of commitment and leadership that Deval has to offer this nation.

I have known Deval Patrick for over a dozen years, since we both clerked for judges serving on the Ninth Circuit of the U.S. Court of Appeals. At that time, and of course since, I have seen many of the same characteristics noted by Judge Stephen Reinhardt in a recent article he wrote for the Los Angeles Times. "As a law clerk, Deval demonstrated a strong commitment to fairness and decency as well as a remarkable understanding of the relationship between law and justice." (2-21-94) Deval will continue to demonstrate that commitment in this new position as head of the Civil Rights Division, just as he has done throughout his professional career.

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However, despite his successes, he has never forgotten how his achievements depended on getting a fair opportunity to succeed. He has dedicated his life to helping to give to others the same chance that he got. I have no question that as the Assistant Attorney General for Civil Rights, Deval will make every effort to break down the barriers of discrimination that hinder so many, so that all Americans can have an equal opportunity to succeed.

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Deval Patrick deserves to lead the Civil Rights Division of the Department of Justice. He brings tremendous personal and professional experience, as well as character, integrity, and dedication, to a position which affects every American.

The CHAIRMAN. Again, Congressman, we thank you very much for making the trip over for your friend, and your comments are noted and we appreciate it very much.

One more procedural matter, Mr. Patrick. The Senator from Massachusetts, Senator Kerry, and I have had a keen interest in the ABM Treaty, and there is a serious question before the Foreign Relations Committee about whether or not there will be any amendments to that ABM Treaty, so I am going to be in and out of here.

I will begin this hearing and get my first round of questioning in and then turn the gavel over to the senior Senator from Massachusetts, Senator Kennedy, but I want you to know at the outset my absence is not lack of interest. My absence is a dual responsibility of having been deeply involved in the debate for 15 years on the ABM Treaty.

Mr. PATRICK. I understand, Senator.

The CHAIRMAN. With that, I thank my colleagues. You are welcome to stay, but we understand you all have other business to attend to.

Senator KERRY. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, gentlemen.

When Senator Kennedy arrives, we will yield to him to make his statement with regard to formally introduce Mr. Patrick, but let me ask you, Mr. Patrick, would you stand to be—yes?

Senator METZENBAUM. Could the Senator from Ohio make a short opening statement, please?

The CHAIRMAN. We agreed there would be no opening statements other than the—if you want to claim him as being from Ohio—if we do that, then I have no basis upon which not to let my other colleagues make one, if the Senator doesn't mind.

Senator METZENBAUM. That is fine. Thank you.

The CHAIRMAN. Would you stand to be sworn, please? Do you swear the testimony you will give today will be the truth, the whole truth and nothing but the truth, so help you God?

Mr. PATRICK. I do.

The CHAIRMAN. One other formality that we have a great interest in: Would you be willing to introduce your wife to us?

TESTIMONY OF DEVAL L. PATRICK, TO BE ASSISTANT ATTORNEY GENERAL FOR CIVIL RIGHTS, U.S. DEPARTMENT OF JUSTICE

Mr. PATRICK. I would be proud to, Mr. Chairman. My bride of 10 years, Diane, is behind me.

The CHAIRMAN. Diane, what State do you claim?

Ms. PATRICK. New York.

The CHAIRMAN. New York. Well, we have got the whole country covered here, I think. Welcome, welcome.

Mr. PATRICK. Mr. Chairman, if I may introduce some other family members in their absence?

The CHAIRMAN. Please do.

Mr. PATRICK. Our daughters, Sarah and Catherine, 8 and 4 years old, are not here today, although I think somebody is somewhere trying to tape this for them. We thought about bringing them here and worried that they would disrupt these proceedings. I actually thought that might be a good idea if they did so on cue.

Senator METZENBAUM. You made a mistake. You should have brought them.

The CHAIRMAN. You made a mistake because it is very difficult to disrupt this committee.

Senator HATCH. We are used to disruption.

The CHAIRMAN. That is right.

Mr. PATRICK. My mother and my grandmother wanted to be here today, but are not, and I just want to mention them. My grandmother is in a nursing home in Chicago and my mother is at home in Boston with our children, and I wanted to mention them, in particular, because most of the press accounts I have read about myself in the last few weeks don't mention them. They make it sound as if my life began at age 13 when I got my chance at Milton Academy and neglect the fact that it was my mother and grandmother's grounding in self-respect and personal integrity which I think has made all the rest possible.

If you will, also, Mr. Chairman, I would just like to introduce some friends who have traveled a great distance to come here today.

The CHAIRMAN. Please do.

Mr. PATRICK. Federal District Judge Lindsay and his wife, Cheryl, are behind me right over here.

The CHAIRMAN. Welcome, Judge.

Mr. PATRICK. My colleagues from Hill and Barlow, Michael Greco, Michael Ricciuti, and Christopher Patusky, are here as well. Our very dear friend, Jody Forkner, has come down, and our friend, Mary Opperman, is also here.

The CHAIRMAN. Welcome, all. Hopefully, you will find this an enjoyable morning.

Do you have any opening statement you would like to make, Mr. Patrick?

Mr. PATRICK. Thank you. Yes, Mr. Chairman, I do, very briefly. The CHAIRMAN. Please.

Mr. PATRICK. Mr. Chairman, at the outset I want to thank you and Senator Hatch and all the other Members of this committee for giving so generously of your time and good counsel in private meetings over the last several weeks. In addition to those on the committee, my thanks also goes out to the many other Senators and the many distinguished Members of the House who have offered their time and, in some cases, condolences and in every case their good advice.

I view each of these conversations, particularly those with members of this committee, as the beginning of a valuable relationship on which I can rely, from which I can learn and with which I can work if I am confirmed. As I have said to many of you, if our dealings in the future are characterized by the same seriousness, high-mindedness and candor with which we have begun, then I think we can count on making substantial progress together in the great bipartisan effort to end discrimination in America.

I also wish to extend my special thanks to Senator John Kerry, Senator Simon, and Congressman Coppersmith for their extraordinary introductions. I hope some day to become the person they say I am and to be worthy of their enthusiasm and support.

Between the introductions and the materials the committee staff have gathered for you, you already know by now a good deal about my personal history and professional background. Rather than recount all of that, I would like to use my time just now to tell you who I am and what themes and values motivate me and inform my outlook as a person and as a prospective civil rights law enforcement officer.

Having come from so little of material value but so much of spiritual and family value to where I am sitting right now, I can tell you with absolute certainty that I understand and know how very much is possible in America. I know that, at its best, this is a land of hope and goodwill, and that the legal and moral effort to end discrimination in this country derives from a sense shared by most Americans that to do less would be a national failing.

We are a great nation, it seems to me, not just because of what we have accomplished, but because of what we have committed ourselves to become, and it is that sense of hope, that sense of look-

ing forward that I believe has made not only our civil rights movement but ourselves as a nation an inspiration to the world.

But our work is not finished. To be sure, you have enacted strong legislation and the Supreme Court has helped to give shape to those statutes and to related constitutional themes. But there is much more to be done, for we still have Americans who cannot get jobs or places to live or bank loans or a decent chance to go to school, or who cannot even participate meaningfully in the political process or get to the door of a public building because of some immutable characteristic about them. Some ultimately irrelevant fact of life still defines and has a profound effect in many, many instances on whether a citizen gets to experience the fullness of American citizenship.

This is apparent, it seems to me, not just to racial, ethnic and language minorities, not just to women and to people with disabilities or others in America who, by virtue of status alone, are left out and left back. It is apparent to all Americans generous enough to see that a victory for civil rights is a vindication of American democracy—something more, as I see it, than the mere shifting of entitlements from one group to another.

That is why I believe antidiscrimination efforts in this country have enjoyed such a noble tradition of bipartisanship and why the continuing movement can do so much today, as it has at important times in the past, to draw us all closer across the many differences between us to the common bond of American citizenship.

Now, Senators, it seems to me, we can and we must do better. The Civil Rights Division must move firmly, fearlessly, and unambiguously to enforce the laws you have passed so that it becomes as plain as it can be that the Congress means what it says when it says that discrimination is illegal.

The Division must proactive, restoring its ties with and trust in all the communities of persons whom the laws are designed to protect, and taking the lead in shaping policies and lawsuits that promote the notion of an inclusive democracy. The Division must continue to earn its reputation for unassailable professionalism by consistently advancing legal positions on behalf of the United States that keep faith with the Constitution and the Federal laws.

Now, I come to this challenge, despite some of the things you may have read, as neither a so-called liberal nor a so-called conservative. I come to this as a pragmatist with very high ideals. I view the civil rights laws as among the most important laws on the books and I believe they exist to help solve real problems in real people's lives. I have litigated cases under many of those laws and I have seen through my cases what the law can achieve in terms of breaking down barriers, opening up opportunities, and reaffirming those core American values of opportunity, equality, and fair play. I know from my own life that those laws and the tone set by vigorous enforcement of those laws can be a source of hope and opportunity, and can help us all know what I know about what is possible in America.

Around the time it began to look as if the President might really nominate me for this post, my 8-year-old daughter wrote in her journal in the second grade that "My daddy might get a job to help

people overcome things." She captured in that sentence the essence of this opportunity for me.

Dr. King used to say that the arc of the moral universe is long, but it bends toward justice. I view this nomination as my chance to contribute to that goal. However complex, however demanding, however controversial or unpleasant or misunderstood it may sometimes be, I view this post as one of the most noble forms of public service, and I am deeply honored, Mr. Chairman, to be before you for your consideration.

If I am confirmed, you can count on me to be fair, you can count on me to be forthcoming and to listen carefully and with an open mind, and you can count on me to be strong. In that spirit, I look forward to working beside the President, the Attorney General and the dedicated professionals of the Department of Justice and with each of you.

Thank you, Mr. Chairman, and I look forward to your questions. [The prepared statement of Mr. Patrick follows:]

PREPARED STATEMENT OF DEVAL L. PATRICK

Thank you, Mr. Chairman.

At the outset, I want to thank the chairman, Senator Hatch and all of the other members of this committee for giving so generously of your time and good counsel in private meetings over the last several weeks. In addition to those on the committee, my thanks also go out to the many other Senators and the many distinguished members of the House who have offered their time and advice. I view each of these conversations, particularly those with members of this committee, as the beginning of a valuable relationship on which I can rely, from which I can learn, and with which I can work if I am confirmed. And as I have said to many of you, if our dealings in the future are characterized by the same seriousness, high-mindedness and candor with which we have begun, then I believe we can count on making substantial progress together in the great bi-partisan effort to end discrimination in America.

I also wish to extend my special thanks to Senator Kennedy, Senator John Kerry, Senator Simon and Congressman Coppersmith for their extraordinary introductions. I hope someday to become the person they say I am, and to be worthy of their enthusiasm and support.

Between the introductions and the materials the committee staff have gathered, you already know by now a good deal about my personal history and professional background. Rather than recount all that, I would like to use my time just now telling you who I am and what themes and values motivate me and inform my outlook as a person and a prospective civil rights law enforcement officer.

Having come from so little of material value, but so much of spiritual and family value, to where I sit right now, I can tell you with absolute certainty that I know how very much is possible in America. I know that, at its best, this is a land of hope and good will, and that the legal and moral effort to end discrimination derives from a sense shared by most Americans that to do less would be a national failing. We are a great nation, it seems to me, not just because of what we have accomplished, but because of what we have committed ourselves to become. And it is that sense of hope, that sense of looking forward, that I believe has made not only our civil rights movement, but ourselves as a nation, an inspiration to the world.

But our work is not yet finished. To be sure, you have enacted strong legislation. And the Supreme Court has given shape to those statutes and to related constitutional themes. But there is much more to be done.

For we still have Americans who can't get jobs, or places to live, or bank loans, or a decent chance to go to school, or who can't participate meaningfully in the political process, or who can't even get to the door of a public building—because of some immutable characteristic about them. Some ultimately irrelevant fact of life may still have a profound effect on whether a citizen gets to experience the fullness of American citizenship.

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to see that a victory for civil rights is a vindication of American democracy—something more than a mere shifting of entitlements from one group to another.

That is why, I believe, anti-discrimination efforts have enjoyed such a noble tradition of bi-partisanship in this country. And why the continuing movement can do so much today, as it has at important times in the past, to draw us all closer, across the many differences between us, to the common bond of American citizenship.

Now, Senators, we can and we must do better. The Civil Rights Division must move firmly, fearlessly and unambiguously to enforce the anti-discrimination laws that Congress has passed, so that it becomes as plain as it can be that the Congress means what it says when it says that discrimination is illegal. The Division must be proactive, restoring its ties with and trust in all the communities of persons whom the laws are designed to protect, and taking the lead in shaping policies and lawsuits that promote the notion of an inclusive democracy. And the Division must continue to earn its reputation for unassailable professionalism by consistently advancing legal positions on behalf of the United States that keep faith with the Constitution of the Federal laws.

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Thank you, Mr. Chairman. I look forward to your questions.

The CHAIRMAN. Thank you.

Senator Kennedy is now here and we would like to yield for him to make his introduction of you from the podium, since he is going to take over the Chair in a moment anyway.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you very much, Mr. Chairman, and I apologize for coming in after the excellent presentation of the nominee. I was unavoidably present at the Armed Services Committee on an important matter, so I appreciate the indulgence of the committee for just making a very brief comment of introduction, although I think that the statement that has been made by Deval Patrick probably indicates the core fiber of his integrity and his soul.

I commend the Chairman, Senator Biden, and Senator Hatch for scheduling the hearing and I am honored to join in commending Deval Patrick for his nomination by President Clinton to be the Assistant Attorney General for Civil Rights. Deval Patrick's extraordinary life and outstanding career demonstrate that the American

dream can still come true for any young man or woman who is given a chance to succeed.

Deval was born in a poor neighborhood on the south side of Chicago. He and his sister were raised by their mother in a basement apartment with only two bunk beds, which meant that every 3d day one of them would sleep on the floor. As a child, he attended a largely segregated public school. He excelled and was told by his teacher about a program in Boston called A Better Chance which granted scholarships to disadvantaged youth. Deval applied and won a scholarship to Milton Academy.

From Milton, he won a scholarship to Harvard where he graduated with honors. At Harvard Law School, he won the moot court competition, was elected president of the Legal Aid Society, and following graduation he served as a law clerk to Judge Stephen Reinhardt of the Ninth Circuit, and then joined the NAACP Legal Defense and Education Fund. For 3 years there, he won significant victories against voting discrimination and other unacceptable forms of bigotry. He then joined the Boston law firm of Hill and Barlow where he has developed an excellent reputation as a litigator in complex cases.

He has maintained his strong ties to the community, serving on the boards of the Boys and Girls Clubs in Boston, Horizons for Youth, WGBH, Milton Academy, the Boston Bar Association and the NAACP Legal Defense and Education Fund. He was appointed by Governor Weld to serve on the Judicial Nomination Council which recommends candidates for appointments to the State courts.

Deval has continued to devote much of his time and energy to pro bono service. In one case, he obtained relief for a class of more than 10,000 low-income borrowers who were victims of unlawful lending practices. In another, he successfully represented a group of low-income tenants who had been denied housing opportunities.

America's motto is E Pluribus Unum, out of many one. The Clinton administration has been at its best in putting the politics of division behind us and reminding all citizens that our diversity is our greatest strength. Civil rights is a bipartisan cause and still the unfinished business of America, and the odyssey of Deval Patrick to this nomination is a welcome and inspiring sign that America as a whole is continuing to make progress in our long national journey toward ending discrimination and guaranteeing equal opportunity for all. Deval Patrick's odyssey is America's odyssey, too.

Finally, Deval understands the importance of building bridges across racial and ethnic lines. In an address he gave on October 5, 1993, to the Boston chapter of the Anti-Defamation League of B'Nai B'rith, he made an eloquent plea for understanding and cooperation between blacks and Jews. I would like to read a brief passage from the conclusion of that address:

While differing perceptions may push us apart, common interests will continue to drive us together, and it is therefore incumbent upon us, particularly in light of our heightened expectations of each other, to listen more closely to each other, to try harder to understand each other, to indulge each other a little perhaps, to stand up for each other whenever we practically can and, to paraphrase Robert Frost, to listen to anything without losing our temper or our self-confidence.

That is the healing message that Deval Patrick will bring to this important office. It is an excellent nomination and I urge the committee to support it.

The CHAIRMAN. Thank you very much, Senator.

Mr. PATRICK. Thank you, Senator.

The CHAIRMAN. We have a distinguished visitor. Secretary Coleman, there is a seat right up here for you. Why don't you come right up front? Welcome. It is a pleasure to have you here.

Mr. COLEMAN. Thank you.

The CHAIRMAN. Mr. Patrick, we will go our first round of questions, limiting it to 10 minutes apiece, and I have two opening questions, one less difficult than the other, I expect. Near the end of your statement, you said you will enforce the law vigorously. One of the criticisms of you from our friends—not a personal criticism, but a criticism of your point of view from our friends on the right is that you are adamantly opposed and have been opposed to the death penalty.

As a litigator at the NAACP Legal Defense and Education Fund, you opposed the death penalty. In addition, in recent speeches you have expressed serious reservations about whether the death penalty can be imposed fairly. As you know, the crime bill that I originally drafted and the one that originally passed here contains provisions for a Federal death penalty, one of which would fall within the purview of the Civil Rights Division, which is where murder results as a consequence of the violation of one's civil rights, there is an ability for the U.S. attorney or the Attorney General to bring a case seeking the death penalty against that defendant.

Assuming for the sake of discussion that that law as passed by the Senate, not passed in the House yet, not the law yet—

Mr. PATRICK. I understand, I understand.

The CHAIRMAN. But assuming it becomes the law of the land, notwithstanding your personal opposition to the death penalty, would you enforce that law as well?

Mr. PATRICK. Of course, Senator.

The CHAIRMAN. Now, let me move to another area, if I may. You are going to quickly confront one of the most important issues in civil rights law today upon your confirmation. The courts are now focusing on the continued vitality of race-conscious districting for legislative bodies, something you know a good deal about, and I would like to talk with you about that for a minute, if I may.

The issue gained prominence last year with the Supreme Court's decision in *Shaw v. Reno*, in which the Court allowed a group of white North Carolina voters to sue under the fourteenth amendment without a showing of injury to their voting strength as white voters. The Court, concerned that the congressional district was so oddly shaped that it must have been drawn on the basis of race, concluded that it must be redrawn.

The district at issue in *Shaw v. Reno* was created as a result of the 1990 census. Prior to that census, no black person had represented North Carolina in Congress in the 20th century, although North Carolina's voting age population at the time of the 1990 census was approximately 78 percent white and 20 percent black, making it, I think, probably the fourth, fifth, sixth, seventh, on a per capita basis, largest black population.

After the 1990 census, North Carolina gained a seat in the Congress, increasing its number from 11 to 12, and the State legislature drew a redistricting plan that created one majority black Congressional district out of those 12 congressional districts.

The Bush administration, pursuant to its pre-clearance authority under section 5 of the Voting Rights Act, rejected this plan because it did not adequately reflect black voting strength. The State then drew a map that included two minority black districts. The Bush administration did not object to this plan and today, for the first time in this century, North Carolina has an African-American Representative in Congress. In fact, the redistricting after the 1990 census yielded several new majority black districts in the South and a record number of African-Americans were elected to the House of Representatives. Since the Supreme Court's decision in *Shaw v. Reno*, challenges to State redistricting plans have been filed in several States.

My first question to you is what is the Justice Department's position on the use of majority/minority districts to comply with the Voting Rights Act?

Mr. PATRICK. Well, Mr. Chairman, before I get the job, I am a little reluctant to try to articulate or defend the Justice Department's position, but I can try to express my understanding of the situation and how I would like to approach these problems, if that is all right with you.

The CHAIRMAN. All right.

Mr. PATRICK. I understand the *Shaw* case, as I understand and respect all Supreme Court precedent, as the law that governs the discretion and the judgments that have to be made in the Civil Rights Division, one among a number of laws that have to be enforced. I understand *Shaw* to say, not surprisingly, that race alone cannot be the sole determining factor in redistricting in the covered jurisdictions, which is to say those jurisdictions under section 5 who are subject to pre-clearance, as it is called, under the Voting Rights Act, and that race may be one of a number of factors, including incumbency and a variety of other factors that have to be considered.

I don't want to speak about the *Shaw* case in particular because, as you know, that is on remand now in the district court in North Carolina, so that there is a determination to be made on the basis of a record whether that particular district will survive a constitutional challenge. What the Supreme Court did, of course, in the *Shaw* case was simply say that white citizens could raise as a constitutional matter a challenge to a district of that kind.

I think that majority/minority districts have traditionally played a role and are among a variety of tools that are available to address Voting Rights Act violations; that the consideration and use of majority/minority districts must be tempered by the considerations set forth by the Supreme Court in *Shaw v. Reno*; that the approach to majority/minority districts must be, if you will, ginger, that is that it should not be, it seems to me, a remedy or a response in a voting context that one should jump to or that one should necessarily promote in advance of other remedies to the problems.

But I think it is at all times important to remember that majority/minority districts arise in jurisdictions with a history of ingenuity in evading and diluting the meaningfulness of participation of all citizens.

The CHAIRMAN. Why don't you explain for the record those States that are still required to go through pre-clearance and why the Congress concluded they should?

Mr. PATRICK. As I understand it, there are a number of specific jurisdictions, mainly in the South but not limited to the South after the most recent amendments, that require pre-clearance, as it is called, under the Voting Rights Act of any vote change, which is to say any change in the method of elections, in the redistricting plans, and so forth, have to be submitted to the Justice Department for review before they are approved.

The Justice Department under the previous administrations, since the beginning of the Voting Rights Act, has very carefully evaluated each of those plans submitted by State legislatures on their facts and made determinations about whether voting strength of African-Americans within the meaning of the Voting Rights Act was diluted or whether there were such racially polarized politics or voting that it warranted some particular close scrutiny of that change.

But they are legislative proposals. They are not proposals that come, as I understand it, from the Justice Department, and I can assure you, Mr. Chairman and the other members of the committee, that if I am confirmed the Department will continue to abide its responsibilities under the law and take those cases as seriously as any other.

The CHAIRMAN. Why is it still important or required that legislatures take into account race when they redistrict?

Mr. PATRICK. Well, because that is what the Supreme Court has said. The Supreme Court hasn't said it is required to take into account race. The Supreme Court has said that in certain circumstances it is permissible to take into account race, and that it is never permissible to take race into account as the sole factor one way or the other, whether the burden is borne, if you will, mainly by white voters or by African-American voters or other protected groups.

The CHAIRMAN. Based on the Justice Department's positions taken since the Clinton administration began, are you aware of any difference in policy from the policy followed during the Bush administration?

Mr. PATRICK. I am not aware of any, no, Mr. Chairman.

The CHAIRMAN. Well, my time is up. I am going to yield to my colleague. As I indicated, I have to go up to the Foreign Relations Committee on an ABM matter. I will be back, but Senator Kennedy will Chair the hearing. I thank you, and I will be back.

Mr. PATRICK. Thank you very much, Mr. Chairman.

Senator KENNEDY. Senator Hatch?

Senator HATCH. Thank you, Mr. Chairman, Senator Kennedy.

Mr. Patrick, you have litigated under the Voting Rights Act and you sit on an organization that does litigation under the act.

Mr. PATRICK. Yes, Senator.

Senator HATCH. There has been a great deal of controversy over the last several months over enforcement of the Voting Rights Act, as there has been since its inception. I consider the Voting Rights Act the most important civil rights bill in history, and I think it has done more to enfranchise African-Americans than anything else.

Without mentioning the substance of any conversations, could you tell the committee whether the President discussed Voting Rights Act enforcement with you?

Mr. PATRICK. In very, very general terms, Senator.

Senator HATCH. Some advocates have proposed that remedies under the act should go far beyond various means of protecting the rights of citizens to vote meaningfully in elections and the creation of electoral districts drawn to include a majority of racial or ethnic minorities.

Now, I want to ask you if you believe that it is ever appropriate for the Department of Justice to seek to impose certain remedies under the Voting Rights Act regarding the way the legislative process itself works, which I will mention in a moment.

I alerted the Justice Department last month that I would put some of these questions to you. In fact, I told them, and when I ask whether the Department should ever seek to impose such remedies, I mean to be all-inclusive, including the Department's taking a position in litigation as a party or through amicus by interposing objections to a jurisdiction's voting plans under section 5 and to issue regulatory or sub-regulatory guidance.

So let me ask you about whether imposing the following remedies could ever be appropriate for the Department: No. 1, setting the number of votes needed to pass any legislation or a particular piece of legislation at one higher than the number of white representatives.

Mr. PATRICK. That is so-called super majority or minority veto. Is that what you are referring to, Senator?

Senator HATCH. Yes.

Mr. PATRICK. Well, let me say, Senator, I am not sure that the question is susceptible to a categorical answer. Let me tell you what I understand the case to be.

Senator HATCH. Sure.

Mr. PATRICK. I am not aware that under the affirmative litigation authority under the Voting Rights Act that there has ever been a case where either the Justice Department has advocated for such a remedy or where a court has imposed such a remedy.

Senator HATCH. Can you think of an instance where it might be advocated?

Mr. PATRICK. Hypothetically, not really, but I can tell you about the one case I know about which has arisen under the pre-clearance provisions. In other words, it was a local proposal, I believe, out of Mobile, AL, where there was a resolution to the settlement to a voting rights—

Senator HATCH. Pardon me if I interrupt you.

Mr. PATRICK. Sure.

Senator HATCH. That may be, but I am talking about the passage of legislation. I am limiting it to that.

Mr. PATRICK. Well, Senator, I am not aware of any authority or any case where the Voting Rights Act has been construed to permit or to require that kind of remedy. If you will, Senator, I certainly appreciate that it is an extreme measure, an extreme idea, and I simply want to say that I think the Justice Department has got to be prepared to react creatively under in extreme circumstances. But as I sit here right now, I can't think of a hypothetical where that particular remedy with respect to a legislative practice would be appropriate, although you know, as I do, about the Mobile arrangement, I think.

Senator HATCH. Sure. It is one thing to act creatively under the law and another thing to act radically under the law.

Mr. PATRICK. Well, I think the most important thing, Senator, if I may, is to act lawfully and consistent with——

Senator HATCH. And responsibly.

Mr. PATRICK. And responsibly and consistent with the Constitution and the Federal laws.

Senator HATCH. I agree with you. Let me give you a second illustration: requiring cumulative voting in a legislative body, say, a city council or a State legislature. Over a period of time and a series of legislative proposals, votes on multiple bills could be aggregated or linked; that is, pending bills of importance to minorities would be linked to pending bills of importance to the majority, and each legislator would have an aggregate amount of votes to cast on the linked bills, although they would not be required to vote on each bill or to vote as a block. Would this ever be an appropriate remedy under the Voting Rights Act as it is currently written, in your view?

Mr. PATRICK. I think you are referring here to what I understand to be cumulative voting.

Senator HATCH. Right.

Mr. PATRICK. My understanding is that the Division has in the past approved cumulative voting plans of a variety of kinds proposed from local jurisdictions. Again, Senator, I think that these cases need to be taken on a case-by-case——

Senator HATCH. That is only when the local jurisdiction decides to do it that way.

Mr. PATRICK. That is my understanding, Senator, that is right.

Senator HATCH. You do not believe you could impose that on a legislative body?

Mr. PATRICK. I am not aware of a case which authorizes that, that is right.

Senator HATCH. Do you believe you could impose it as a sitting Assistant Attorney General in charge of civil rights?

Mr. PATRICK. Well, I think the question is whether the law would support such an imposition of a remedy. Again, I view that kind of remedy as an extreme kind of remedy, suitable perhaps in a very extreme kind of case, but I just don't know, Senator, whether there have been cases that have authorized the imposition of that kind of remedy in an affirmative litigation under the Voting Rights Act.

Senator HATCH. Let me give you another one.

Mr. PATRICK. Sure.

Senator HATCH. Would a requirement of a super majority vote on issues of importance to the racial majority ever be an appropriate

remedy for the Department of Justice to impose under the Voting Rights Act?

Mr. PATRICK. You mean sort of using super majorities for some kinds of votes, but not others, like the ratification of treaties here in the Senate rather than the passing of a motion or something like that?

Senator HATCH. Yes, but I have limited it to a racial majority. In other words, sure, we have super majority votes in the Constitution, but I am talking about the Voting Rights Act, whether you could impose that through the currently written and interpreted Voting Rights Act.

Mr. PATRICK. Well, again, Senator, I am not aware of any case where, apart from the Mobile experience of which you are aware—apart from the Mobile experience, I am not aware of any case that has authorized the use of that kind of remedy.

Senator HATCH. Would that be considered extreme by you as well?

Mr. PATRICK. In an extreme case, you know, it is hard to know whether it would be considered extreme. Hypothetically, and as I sit here today, it strikes me as a reach, but again I think you take these cases one at a time. And you know, as I do, Senator, that we are talking about situations where there has been, you know, a history of ingenuity in avoiding or impairing the ability of all Americans to participate meaningfully in the political process and, as I say, I think you just have to take those cases one at a time.

Senator HATCH. Well, the Court may some day decide that some of these are not too extreme, but I would be surprised if they would.

Mr. PATRICK. It is possible.

Senator HATCH. But the real question is whether you can, in this position, decide unilaterally to do that and impose them.

Mr. PATRICK. Senator, I come to these problems like I do to any problems, as a problem solver. I don't come to this looking to promote any particular legislative or other result over any other. I am looking to make sure, if I am confirmed, that the law is complied with and that there is as practical and responsible a response to a violation of law as possible.

Senator HATCH. Well, I am really impressed with you in that regard because you made that very clear to me when we discussed these matters.

What about a requirement of a concurrent majority to pass legislation; that is, in order to pass, legislation would need the support of a majority of minority representatives, however defined, as well as a majority of majority representatives?

Mr. PATRICK. I think I follow. I am not sure I understand concurrent majorities very well, frankly, Senator.

Senator HATCH. But that would worry you as well?

Mr. PATRICK. Well, I have the same approach to that as I have to the other prospective remedies you have talked about.

Senator HATCH. What about requiring that a racial minority be able to veto certain legislation?

Mr. PATRICK. That, I equate, if I understand it correctly, with the notion of a super majority that is designed around race, and I think it raises the same kinds of issues and concerns and the same kind

of fact-specific analysis. But, again, I think it would have to be a pretty extreme case to consider—

Senator HATCH. So all of these are pretty extreme remedies is what you are saying?

Mr. PATRICK [continuing]. Well, they are extreme depending on the context. If there has been an extreme violation—and we have seen that, you know that, from the history out of which the Voting Rights Act arises. In an extreme case, it may be that an extreme remedy is appropriate.

Senator HATCH. But, again, what we are talking about is whether the Department can impose these types of remedies. Let me just ask one more. Would the rotation in office between two racial groups, you know, going from one to other, ever be an appropriate remedy for the Department to impose under the Voting Rights Act as currently written?

Mr. PATRICK. Well, again, without being an expert in that dimension of the Voting Rights Act, I can tell you that I would have some pause on that.

Senator HATCH. Well, I am glad to hear that. These are important issues and they are issues that should be debated in law school, as far as I am concerned, but we are talking about enforcement of the law. I admire you for your practical approach to it and your desire to solve problems and help society move further toward non-discrimination.

Mr. PATRICK. Thank you, Senator.

Senator HATCH. I appreciate your answers.

Mr. PATRICK. Thank you.

Senator KENNEDY. One of the measures of the skill and fairness and balance that you have shown as a lawyer is that one of the defendants whom you sued in a civil rights case is President Clinton, who has nominated you to this important position. Could you tell us a little bit about the case and what lessons you draw from it about how to conduct the operations of the Civil Rights Division?

Mr. PATRICK. Sure. Senator, the lawsuit against President Clinton was not personal.

Senator KENNEDY. I gather that.

Mr. PATRICK. He was sued, as were all the constitutional officers in Arkansas, because under the Arkansas Constitution as it was then written all of the constitutional officers constituted the election commission, and also as defendants in the case were a defendant class of the county clerks who, under the laws of Arkansas, were responsible for registration practices in Arkansas.

That was a case which called into question a number of practices in the State that prohibited the ability of poor but eligible citizens, many of whom were African-American, to get registered and therefore exercise their right to vote. We took months of depositions in that case of the defendant clerks and the depositions proved in that case, as they do in many cases, an educational opportunity. It was educational for us as representatives of the plaintiff class and it was educational for the defendants as well, the members of the county clerk class, and they began to understand some of the points we were making about what was practically possible in making the voting registration opportunities as widely available as pos-

sible and eventually came around to some of the proposals that we considered appropriate remedies.

I met then Governor Clinton in the course of negotiating that settlement, and indeed he became a part of the negotiations of that settlement. I might add that many of the provisions of that settlement now appear in Federal legislation in the form of the motor voter bill.

Senator KENNEDY. Well, I think that was a very impressive record that was developed, and again demonstrated your abilities to bring divergent forces together and work out a very acceptable and fair and just solution. I think as you mentioned in your earlier comments, the whole process of denying people the right to vote, whether it was just blatantly denying them, whether it was the utilization of the literacy tests, whether it was the utilization of the poll tax, whether it was the fact that when those minorities were able to gain election to different kinds of commissions, States would go ahead and withdraw powers from those commissions, the ingenuity in denying people the right to vote has, as you mentioned earlier, been unlimited in some parts of the country. We don't do as well as we should in Boston, I will add, as well, in terms of inclusion.

As you mentioned, the President has signed the motor voter bill to remove barriers to voter registration, and it seems to me that given your own background in the area of voting, he will have an excellent candidate to see that the new motor voter bill is properly enforced.

Let me go on to housing discrimination.

Mr. PATRICK. Yes, Senator.

Senator KENNEDY. This is among the most invidious forms of bigotry, since it perpetuates the isolation that is the root of prejudice. Congress recognized that fact. In 1988, we passed legislation to put real teeth into the Fair Housing Act, as you remember, passed in 1968, and it was one of the important civil rights bills that didn't really have the tough kind of enforcement procedures and was very ineffective in dealing with discrimination in housing.

Then, at the end of 1980, actually, we missed being able to pass an effective fair housing bill. It was filibustered. We were three votes short in terms of passing that bill, but did in 1988 dealing with discrimination on race, also with regard to disability, and also with regard to children.

I mentioned earlier in my remarks about your success in one lending discrimination case in Massachusetts, and perhaps you would describe it for us and tell us how you intend to pursue cases of this kind if you are confirmed.

Mr. PATRICK. Well, Senator, the case you are referring to was a case against a very large Massachusetts retail bank which actually never turned into a lawsuit. In that sense, it was doubly satisfying. What we discovered after following up on some newspaper reports about a lending scam, so-called, in the greater Boston area mainly arising out of home improvement lending where the bank had arranged with various home improvement contractors to go out and make sales of vinyl siding or other kinds of home improvements, and also arranged the financing as a part of that deal and frequently failed to give the legally required disclosures with respect

to the terms of the deal—so you have both shoddy work in many cases and exorbitant interest rates or other terms of the lending which had not been disclosed, and there seemed to be a targeting of the communities of color in the greater Boston area.

We got involved in that case on behalf of the residents mainly in Roxbury, Dorchester and Mattapan. The attorney general became involved in the case as well and we sent a demand letter and that then produced two months of fairly intensive negotiations without the filing of any complaint, and then ultimately a result that benefitted, I think the latest number was over 10,000 borrowers in the State, and also created some new money for affordable housing, among other remedies.

I think that the lesson of the case, if I may, Senator, is that, again, many, many times when you bring to the attention of defendants—not always, but many times when you bring to the attention of defendants the seriousness of the problem, the integrity of the violation of law and the practicality of a solution, you can get to the bottom line without a lawsuit.

I do think you have to be prepared credibly to file that lawsuit, and I think they were in this case very sure that we would. I am also quite sure that though the negotiations were on many occasions tense, the bank is itself quite proud of the result that came out of that case.

Senator KENNEDY. Well, I think voting rights and housing are very important areas of trying to root out the problems of bigotry in our society. Quite clearly, your own knowledge, understanding and awareness of these laws and the practical application of them in ways that have brought about positive results through, in these instances, adjustment and accommodation, and given the background of your experience in terms of prosecution and using the courts as well, I think, is an impressive balance.

Let me go into a different area, and that is with regard to the tension that exists between racial and ethnic groups in our society. I think all of us are mindful that until we really free our society from bigotry, America will never be America. Indeed, many of those who came here to this country fled other situations to be free from bigotry.

All of us remember how closely the black and Jewish communities worked together in the 1960's to wipe out segregation and to enact legislation to protect the civil rights of all Americans. Recently, we have seen the emergence of some who seek to foment anti-Semitism and divide two historic allies. As I mentioned in my earlier remarks, I was impressed by your remarks to the Anti-Defamation League in Boston last year on the need for sensitivity and understanding between blacks and Jews.

Could you tell us your views on those who seek to foment division and tension between these groups?

Mr. PATRICK. Senator, I feel very strongly that as a Nation we will rise or fall together, and I think that, as I indicated in my remarks to the ADL in Boston, in some respects in the black community and in the Jewish community we expect more of each other. I hope to use what has been described to me as the bully pulpit of this post, if I am confirmed, to speak out as unequivocally as hu-

manly possible to bigotry wherever it comes from, and I have been encouraged to view this post that way.

I think there is another dimension that we have to think about and should think about, too, and that is the opportunity to listen. I am concerned that we don't spend enough time trying to understand each other, trying to understand what the particular sensitivities are, what the particular concerns are, and what some of the sub-texts are of the positions that we take.

I also think, if I may, Senator, that it is important to remember that none of the communities in this Nation of immigrants of ours is monolithic and that there is any one particular view that represents the view of everyone in that group. I think it is very, very important, though, to try to absorb and understand as many different views as possible. I think that deepens perspective and makes judgments and decisions from a public policy kind on down better.

Senator KENNEDY. Well, I certainly applaud that view, not just expressed here before the committee, but certainly as one that you have lived by and have spoken openly about in ways which I can just say with regard to our own city of Boston have had a very important and powerful and constructive and positive effect. I think having that kind of leadership in the Justice Department in this country at this time is enormously important and is certainly a quality which I think the American people support. I certainly congratulate you for that quality.

Mr. PATRICK. Thank you, Senator.

Senator KENNEDY. Senator Thurmond?

OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Thank you, Mr. Chairman. Mr. Patrick, we are glad to have you with us.

Mr. PATRICK. Good morning, Senator.

Senator THURMOND. I enjoyed talking with you in my office several days ago.

Mr. PATRICK. As did I.

Senator THURMOND. I think you are well qualified and I expect to support you.

Mr. PATRICK. Thank you, sir.

Senator THURMOND. I have a few questions here I want to ask you. It is my understanding that you assisted in the briefs filed in the Supreme Court in *McCleskey v. Kemp*. As you know, in *McCleskey* the Supreme Court held that a capital defendant challenging a death sentence on the basis of racial discrimination must prove that there was purposeful discrimination and a discriminatory effect on him.

I believe the Supreme Court rejected the claim that the statistical analysis of capital punishment established a violation of *McCleskey's* constitutional rights.

Mr. PATRICK. That is generally correct, yes, Senator.

Senator THURMOND. Subsequently, there were legislative efforts to overturn the *McCleskey* decision. Many prosecutors vigorously opposed legislation of this type, arguing that it would effectively abolish the death penalty. Under legislation to overturn *McCleskey*, statistics alone may make it unlawful to impose a

death penalty even in the absence of any prejudicial or constitutional error in the trial or penalty phase of the particular case before the court.

Here in the Senate, we have defeated legislation designed to overturn McCleskey time and time again. I don't know whether you are familiar with that or not that we have defeated that legislation.

Mr. PATRICK. I am not familiar with that, no, sir.

Senator THURMOND. We have defeated it time and time again. Now, do you believe that McCleskey was rightly decided?

Mr. PATRICK. Well, Senator, I was on the opposite side of the majority in the McCleskey case, so I think reasonable minds can differ about McCleskey. As you know, the vote in that case was 5 to 4. I think we had a very difficult case going in, although it followed in a tradition of litigation around the fairness in the administration of the death penalty that stretches back a couple of decades. But McCleskey is the law of the land and that is a settled question at this point, sir.

Senator THURMOND. And you will support the Supreme Court in that decision?

Mr. PATRICK. I think I have no choice as a prospective law enforcement officer but to support the Supreme Court there, sir.

Senator THURMOND. Mr. Patrick, there is much discussion and debate in the Congress concerning President Clinton's proposal to raise taxes on the American people. It is appropriate for there to be spirited discourse on the issue of taxes because as elected officials we are directly accountable to the American people.

Over 200 years, consent to taxation has come through the ballot box. A resolution adopted by the Stamp Act Congress in 1765 protesting excise duties imposed by Great Britain on the colonists stated, "It is insuperably essential to the freedom of a people that no taxes be imposed on them, but with their own consent given personally by their representatives." Yet, this fundamental principle was turned on its head in the *Missouri v. Jenkins* decision handed down by the Supreme Court in 1990.

Essentially, the *Jenkins* decision grants power to the Federal courts to order new taxes or tax increases to carry out a judicial remedy. It is my firm belief that the American people lack adequate protection when they are subject to taxation by unelected, life-tenured Federal judges. As James Madison stated in *The Federalist* No. 48, "The Legislative Branch alone has access to the pockets of the people."

I introduced legislation to alter this decision and preclude the lower Federal courts from issuing any order or decree requiring the imposition of any new tax or to increase any existing tax or tax rate. I firmly believe that the Constitution explicitly reserves the power to tax as a legislative function where representatives are accountable for unnecessary taxes.

I would hope that you would take a position in favor of that position if anything comes up in which you would have any connection with it because we don't want Federal judges putting taxes on the people or increasing taxes. We want the Congress to do it or the legislative bodies in the States to do it. I assume you will take that position if it did come up.

Mr. PATRICK. Senator, I certainly understand your concern. As a prospective law enforcement officer, I think I have—on that question, as in all others, I have to be guided by the Supreme Court and for the time being the *Jenkins* decision is the law of the land. But I certainly understand your concern and that the remedy is an extreme one.

Senator THURMOND. Well, you wouldn't voluntarily enter into some position to oppose the Congress in trying to do this, would you?

Mr. PATRICK. Voluntarily enter into a—I am sorry, Senator. I am not sure I understand.

Senator THURMOND. To oppose the Congress in trying to accomplish this.

Mr. PATRICK. To oppose the Congress?

Senator THURMOND. What we want to do is leave it to the Congress—

Mr. PATRICK. I understand.

Senator THURMOND [continuing]. Or legislative bodies of the States.

Mr. PATRICK. I am sorry. I understand your question. I would certainly be interested in looking at it. I am not familiar enough with the bill to be able to comment on it very thoughtfully at this point, but I do understand the issue.

Senator THURMOND. Mr. Patrick, last month Attorney General Reno stated that the Justice Department will use the theory of disparate impact in housing discrimination cases. This principle has traditionally been used in employment cases. What is your view of this principle to be used in housing discrimination cases, and do you believe that the business necessity defense from *Griggs* is practical in this area?

Mr. PATRICK. Well, let me take the second part first, if I may, Senator. I think that some opportunity for a defendant to offer a justification in a disparate impact case is not only appropriate, but the law of the land. But to the first point, like any other theory, I think that the position that the Department of Justice takes through the Civil Rights Division, if I am confirmed, has to be firmly grounded in case law and good sense.

My understanding is that all of the courts of appeals who have addressed the subject have found a disparate impact theory appropriate under the Fair Housing Act. That doesn't mean necessarily that every case is appropriate for a disparate impact approach. I think that has to be taken on a case-by-case basis, but I certainly understand what I perceive to be the premise of the question, sir.

Senator THURMOND. My last question is sometimes general concepts are used so often that different people mean different things when stating a concept. Could I ask you, what is your definition of a racial or gender quota?

Mr. PATRICK. Well, you know, I wrote down when Senator Hatch was making his opening statement the term he used, "numerical straightjackets." I understand a quota to be a numbers game with a particular number which is both a ceiling and a floor, has no flexibility, and may in some circumstances, or indeed in most circumstances, ignore the notion of qualifications and otherwise, as I have described it to be, against the law.

I also understand affirmative action to be something different than that, as described and authorized by the Supreme Court, being a set of goals of timetables that has to be flexible that in many cases starts with recruitment and training and can go right on up through the various employment decisions that have to be made, has to be reserved for limited circumstances and has to be flexible. I understand that to be the law of the land and part of the responsibility of the Division in abiding the law of the land, sir.

Senator THURMOND. Mr. Chairman, I have no further questions.

Senator KENNEDY. Thank you very much.

Senator Metzenbaum.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. Mr. Patrick, it is nice to welcome you and see you once again.

Mr. PATRICK. It is nice to see, Senator.

Senator METZENBAUM. You have certainly been praised from every member of this committee and I think you are going to make a fine Assistant Attorney General for Civil Rights.

Mr. PATRICK. Thank you.

Senator METZENBAUM. When you were in my office, I indicated to you that I had a major concern, and the major concern has to do with the fact that I think that there are literally tens of thousands, actually hundreds of thousands, of black children who are not being adopted by reason of bigotry on the part of some in the social welfare system.

I think that the goal for all children in the welfare system should be permanent placement in a loving and stable home as soon as possible. But, unfortunately, for many children in the system the goal never becomes a reality. One major reason for the failure to provide children with permanent homes is a policy on the part of some social workers that prevents foster care children from being adopted by available, qualified adults solely because the child is of a different race than the prospective parents.

Several State and local child welfare agencies virtually prohibit multiethnic and transracial foster care placements and adoption placements. Actually, some agencies prevent the adoption of children by prospective parents of a different race even after the child and the parents have bonded through years of living together in a loving foster care home. The foster care parents have had the child, brought the child up. The child is of a different race. Now, they want to adopt the child and, boom, they are stopped.

I must tell you that those little children have nobody to speak up for them, except we in Congress, in order to protect their rights. Frankly, when they move from foster home to foster home to foster home, then they are suddenly turned out on the streets of America.

Let me give you some examples. In Minnesota, a biracial couple was forced to give up their 4-year-old black foster son whom they tried to adopt solely because of a State law that discourages transracial adoptions. That is Minnesota. You would expect more of Minnesota. [Laughter.]

Mr. PATRICK. I am not going to touch that.

Senator METZENBAUM. It is a northern State, it is a so-called progressive State, and I cannot believe it in this day and age. The lit-

tle boy and his foster family shared a caring and nurturing interracial home for more than 3 years.

In Arizona, a white couple was seeking to adopt their 3-year-old black foster daughter who came to live with them when she was only 3 months old. Nobody argues about the fact that this couple made wonderful foster parents, but yet they face an uphill battle to preserve their loving family because of State policies in which race is the controlling factor in placement decisions.

Senator Carol Moseley-Braun and I and a number of other members of this body introduced the Multi-Ethnic Placement Act to help these and other children of all races, colors, and national origins who are being denied the opportunity to be part of a stable and caring interracial family when placement with a same-race family is not available. I take the position that if there is a same-race placement that is available, I respect that as a preference.

I know that some whom you know from up in the Massachusetts area think that you ought to have no discrimination. I have spent a lifetime fighting discrimination. I have marched with Rev. Martin Luther King. I have fought to open clubs. I introduced the first antidiscrimination law in Ohio over 50 years ago. But when it comes to this area, I believe that if a same-race placement can be made, that is preferable. But when it can't be made, I feel very strongly that the white parents, if that happens to be the case, and it is a black child, should not be prevented from being able to adopt that child.

Our bill which has bipartisan support would cut off certain Federal funds to agencies that have policies against transracial adoption. Although I am told that you don't wish to comment about specific legislation, let me ask you whether you believe that policies prohibiting transracial adoptions in most or all circumstances are unconstitutional?

Mr. PATRICK. I think they are unwise, Senator. I haven't studied the constitutional question, but they are unwise. When we were together, you remember I told you all I knew about the debate at the time, which is that I think the black social workers group, on the one hand, has expressed itself publicly as being very hostile to transracial adoptions, and that my friend and others up at Harvard Law School have expressed themselves on the other side of that question.

I understand both sides of the question, and since we were together I went to look at your bill. As I indicated at the time was my instinct, now my studied response is that it is a wise and appropriate compromise. I think it is important to understand what it is the black social workers are worried about in terms of the ability of some families to help young black children understand the experience of growing up as an African-American. But I think it is also an overriding concern that children not languish in the public systems, in the public welfare systems, when there are loving families available and interested and willing.

So I think that the bill, if I may address this to both you and Senator Moseley-Braun, is a wise and appropriate compromise. Now, I have stepped way outside, I think, the responsibility of the Division, except to the extent, I suppose, that title IX addresses the

question whether Federal funds should be directed to agencies that are preventing transracial adoptions.

Senator METZENBAUM. Thank you. I appreciate your view. The issue of transracial adoption in the past has been handled by the Office of Civil Rights in the Department of Health and Human Services. Do you believe the Office of Civil Rights at the Justice Department also should address this issue with an eye toward bringing lawsuits on behalf of the many children and adults who are the victims of racially discriminatory adoption policies?

Mr. PATRICK. Well, Senator, I think that it is clearly an issue related to the substance of the work of the Civil Rights Division. I think it would probably be better for me to evaluate the resources of the Division and the comparable resources of—~~is it HHS—~~

Senator METZENBAUM. Yes.

Mr. PATRICK [continuing]. Before making a determination. But it certainly seems to me to complement the work of the Division as it is now.

Senator METZENBAUM. Let me change subjects. In August 1992, Andre Jones, a black Mississippi teenager, was found hanging from shoelaces in the Simpson County Jail. He was the 42nd inmate to die by hanging in Mississippi State jails since 1987. That is absolutely incredible; it is unbelievable, 42 inmates to die by hanging in 7 years. Twenty-three of those inmates were African Americans. I am aware that the Department of Justice is looking into the circumstances of Jones' death. To date, the Department has yet to determine if there is enough evidence to justify prosecution.

Given the history of race relations in this country and the circumstances of Andre Jones' death and the sheer numbers of so-called suicides in Mississippi jails, a strong finger of suspicion points toward Andre Jones' jailers. It is hard to believe that that many young men decided to hang themselves with their shoelaces in that period of time. It is a very upsetting fact of life.

Mr. PATRICK. I am aware, Senator, that the Division is conducting an investigation. Since it is an ongoing investigation, they won't tell me very much about it, but I understand that there is an investigation ongoing.

Senator METZENBAUM. Do we have your assurance that you will review the Department's investigation and attempt to expedite the procedure? This is an intolerable fact of life and I don't know how many more will be found hanging while the investigation continues.

Mr. PATRICK. I certainly share your concern, Senator, yes.

Senator METZENBAUM. Thank you very much, Mr. Chairman.

Senator KENNEDY. Senator Simpson.

OPENING STATEMENT OF SENATOR SIMPSON

Senator SIMPSON. Mr. Chairman, I thank you and I will be very brief because I know others have been here far longer than I, since I just wandered in. I see you are going by the revered act of seniority, which I used to denounce in every forum, this is a wonderful thing for you to have done. I see the scowls and the opprobrium and the ridicule from my colleagues. [Laughter.]

Senator SIMPSON. Mr. Patrick, it is good to see you again.

Mr. PATRICK. It is nice to see you, Senator.

Senator SIMPSON. We had a very good meeting. I enjoyed that very much.

Mr. PATRICK. So did I.

Senator SIMPSON. I am certainly well satisfied that you have the necessary background and experience to head up the Civil Rights Division. We talked about one of your predecessors, Wade—well, there has been a remarkable group as we spoke of the Solicitor, Wade McCree, and then we talked of Drew Days and we talked of other people that we have both known that have worked so hard in this area.

Of course, education and experience do not necessarily alone qualify one for confirmation, and I was interested in your views and asked you about many of the issues that will come before the Division you will head if you are confirmed. I remember the very delightful things we shared about Wade McCree and Drew Days.

I also had a long visit at the time with Lani Guinier, an earlier nominee for this position, and went through some of the things that she had written, and you and I talked about that. She wrote law review articles proposing different voting methods to guarantee that minorities receive a proportionate amount of legislative results. One of the questions that I asked her was, well, do the things you say—would they fit if we were talking about the country of South Africa? She never hesitated. She said, yes, they would. That was a very interesting and very authentic response from her, and I don't know where I would have been in the final vote, but she certainly impressed me with her answer.

But in one of those review articles written for the Virginia Law Review, she had discussed authentic representatives and in a footnote she asked, "Would descriptively black representatives who were also Republicans qualify as black representatives." I am not sure if that qualifies as a stereotyping of Republicans, but it is a rather unique phrase.

I would appreciate a response to that question she posed because we get into this area and always the issue of racism is up there, and the only way to deal with it, I guess, is right out in front. I would like to ask you what you think of that. To me, it was a rather troubling statement.

Mr. PATRICK. Well, Senator, as I think when we met in your office I told you, I am a friend of Professor Guinier's, but not much of a student of hers. I am aware of that footnote, but I am not aware of the context in which it arises. But let me try to respond to what I think is the premise of your question and give you some idea of my own feelings on the subject.

I don't think that adequacy of representation for African-Americans depends on the race of the representative. I think that adequacy of representation depends on a variety of things that have nothing at all to do with race, but may sometimes bear on race. I think that authenticity, if that is the term, would seem to me to be at its most appropriate and most—well, at its most appropriate when we are talking about representatives who truly respect the concerns and issues of his or her constituency, and that those issues have nothing at all to do with race.

I think we will reach a day—I really believe this—some time in this country where race won't matter. I really do think we will get

there one day, and I guess that is the essence of my response, if you would.

Senator SIMPSON. Well, I do hear that. Again, stereotyping is not limited to race, unfortunately, and I think that is an unfortunate type of reference. But, nevertheless, let me go to a final question.

Mr. PATRICK. Sure.

Senator SIMPSON. We had a debate on quotas; we have had them for the last many years. When we amended title VII, we were very concerned that as a result of the enforcement policy which would make it virtually impossible for an employer to defend against a lawsuit if his racial, ethnic, or gender numbers did not meet a preconceived balance, employers would quietly hire "by the numbers" to avoid a lawsuit even if he or she had to hire less qualified persons.

Now, proponents of that enforcement policy, of course, argued that, "We are not imposing quotas," but some of us feared that would be the very result. The Bush administration was severely injured, and here was a President who had been on the side of racial equality and justice, but nevertheless, by arguing over the word "significant" or "sufficient"—I don't remember what it was—it all fell into the basement. It was beyond my comprehension, but many things are.

Let me give you a current example because this is right up to date. Under the President's health care bill, a National Council on Graduate Medical Education is established. That is the title. Among other things, this extraordinarily powerful National Council, which is receiving some criticism from Democrats and Republicans alike, will allocate funding to eligible programs for physician training, a pretty important thing.

It will allocate federally funded training slots for each medical specialty among medical schools and teaching hospitals. This is how the bucks will go out. In determining how it will distribute these slots among the medical schools, it will consider as one factor, the extent to which trainees include members of racial or ethnic minority groups, and also by considering with respect to those racial and ethnic groups represented in the training program, the extent to which the group is underrepresented in the field of medicine generally and in the various medical specialties. I assume that that could also mean overrepresented in the field of medicine, and there are those who then will find racism in that.

So I ask you, what effect do you think these factors will have on those who administer medical training programs and are competing for National Council training slots and Federal funds for medical specialists in their schools where medicine, the highest discipline, is dependent strictly on merit?

Mr. PATRICK. Well, Senator, I am not well enough informed about the particular proposal to comment on it directly, but I could tell you that quotas, as I understand them—and indeed I quoted Senator Hatch when he was out of the room. I think the term "numerical straightjackets" captures what I understand a quota to be, and I understand a quota to be unlawful.

On the other hand, affirmative action is lawful, and that is a much more flexible, much more subtle analysis that requires a much more careful review, and there has to be built-in flexibility

among other features to make affirmative action appropriate. I think if that plan is reviewed and carried out in accordance with the law, then that ought to be the end of the inquiry, and that if that other dimension of the law, which is the requirement of periodic reconsideration of the plan, is also employed, then, at least, we will be able to know from experience over a period of time whether the objectives of that plan have been successful and carried out in as thoughtful a way as possible, fully respecting the rights of everyone.

Senator SIMPSON. You are not going to be in the area of the health care issue, but would you not believe that there would be a serious risk that a rational administrator might decide to prefer some applicants over others because of race or ethnicity in order to improve his or her racial and ethnic numbers in order to maximize the chance for obtaining these remarkable medical training slots and evermore remarkable funding?

Mr. PATRICK. Well, Senator, I think the question is whether it is an administrator who is abiding by the law, and if an administrator is abiding by the law then he or she does not abandon appropriate qualifications and enforces the affirmative action plan, if that is what it is, consistent with the law. But I think it is—again, I am somewhat reluctant to talk about this hypothetically without having studied it, but again I think from a law enforcement point of view, which is the point of view I have come to you with, my main concern is whether the plan is being enforced in accordance with the law in all its dimensions.

Senator SIMPSON. Well, I believe that you will do that, or make every honest attempt to do that, knowing that the courts have rejected racial classifications, no matter what race they benefit now, with the *Shaw v. Reno* decision and even back to *Bakke*. But you are an impressive man and my hope and prayer is that you will do it honestly and fairly, and I think you will in the face of pulls and tugs at you which will be extraordinary.

Mr. PATRICK. I will sure try, Senator.

Senator SIMPSON. I know you will. Thank you very much.

Mr. PATRICK. Thank you.

Senator SIMPSON. Thank you, Mr. Chairman.

Senator KENNEDY. Thank you very much.

Senator HEFLIN.

Senator HEFLIN. Have you all already gone?

Senator FEINSTEIN. No.

Senator HEFLIN. I would yield to them first. I just came in.

Senator KENNEDY. Senator Feinstein.

Senator COHEN. Is this an abdication of the seniority rule?
[Laughter.]

Mr. PATRICK. Momentary, I am sure.

Senator KENNEDY. Different committees do it different ways.
[Laughter.]

Senator KENNEDY. Senator Feinstein.

OPENING STATEMENT OF SENATOR FEINSTEIN

Senator FEINSTEIN. Thank you, Mr. Chairman. Mr. Patrick, welcome again.

Mr. PATRICK. Thank you, Senator Feinstein.

Senator FEINSTEIN. Mr. Patrick, one of the areas that I have been very interested in is the growing number of hate crimes in our country. As a matter of fact, there is now an amendment to the crime bill. I spoke to you about this in my office a little bit.

Mr. PATRICK. That is right.

Senator FEINSTEIN. It has passed the House and I believe it will become law. I want to make a couple of points to you and then ask for your reaction. One problem is hate crime statistics which are very different. The FBI hate crime statistics indicate, for example, that in 1992 there were approximately 75 of them in California, but in that same year the San Francisco Police Department reported 377 and Los Angeles County reported 736. So there is a wide variation in the statistics between the FBI and the local jurisdictions.

The first thing I would like to ask is that you take a look at it and see if we can't develop some kind of uniform reporting that is better than what we seem to have today.

Mr. PATRICK. Understood, Senator; I understand.

Senator FEINSTEIN. The bill that I introduced dealt with hate crimes committed in Federal jurisdictions. I am hopeful that States will use it as a model. I believe California very well may follow in that regard, and I believe that it is essential that this new law be pursued vigorously by the Department of Justice. The law enhances sentences by about three levels, so that an offender would be behind bars approximately a third longer if you can prove that the felony took place, motivated beyond a reasonable doubt, on the basis of hatred, on the basis of race, creed, color, national origin, ethnicity, disability, gender, or sexual orientation.

If signed by the President, what priority will you give to seeking enhanced sentences for hate offenders?

Mr. PATRICK. Well, I think hate crimes are one of the most serious problems in the country. I have read a couple of newspaper reports that indicate that hate crimes are on the rise. I also understood that at one time in its history—it may be true now, I am not sure, but at one time in its history the Civil Rights Division had a particular task force, for example, that targeted skin heads.

I think organized bigotry—if you will, a subset of hate crimes—is something that deserves, as well, the highest attention of the Division. I think we have an expression in the neighborhood I grew up in about how we are going to be on something like white on rice. If I get the chance, I think this has to be a very, very serious priority of the Division.

Senator FEINSTEIN. Thank you very much.

Mr. PATRICK. Thank you, Senator.

Senator FEINSTEIN. Now, I appreciate the fact that you are philosophically opposed to a death penalty, but if I understood your answer to prior questions, you said that you believed that it was constitutional and within the law. Is that a correct interpretation?

Mr. PATRICK. The state of the law today is that we have and may have a death penalty in this country under certain circumstances, yes, Senator.

Senator FEINSTEIN. Now, as Assistant Attorney General, you would be responsible for enforcing criminal laws prohibiting civil rights violations. That would include racial hate crimes; it could in-

clude police brutality crimes. In appropriate circumstances such as premeditated race-based killings, would you seek the death sentence?

Mr. PATRICK. Well, Senator, right now, as you know, there is no jurisdiction in the Division over the death penalty, so I will answer your question on the assumption that the Senate bill which includes a death penalty for hate crimes or for civil rights violations passes into law. And I think, you know, as I have said to you when we were together, I have searched my conscience on this question because I do have some reservations about whether the death penalty can, by fallible human beings, be imposed in a fair way. But I understand above all that what I am being considered for is a law enforcement post and that I have to set my personal views aside, and I am prepared to do that.

Senator FEINSTEIN. Thank you very much.

Mr. PATRICK. Thank you, Senator.

Senator FEINSTEIN. Now, again, following this issue of hate, I was reading, if I can find it in here, one of your comments in an Anti-Defamation League speech that you made that really interested me. You said that you didn't know how many people have seen the production of "The Fires of the Mirror," and then you were participating in a panel in which a number of members of the audience expressed different levels of frustration with white America, frustration with black reactions to tragedies involving Jews, frustration with the Hasidim, frustration with Rev. Al Sharpton.

"I have my own frustrations, and they concern the fact that lost amidst all that uproar, all that violence, all that name-calling and rage was the tragedy of the two young victims, the little West Indian boy run down and the Israeli graduate student stabbed a day or two later. What it says to me," you said, "is that we so often abstract our relations to the level of unanswerable quandaries that we forget the essential human qualities that bind us most closely of all."

I think you really hit the nail on the head and I see that just happening all over our society, with divisions growing deeper and deeper, and animosity greater and greater in a country that is supposed the most tolerant and accepting of them all. I think this is really your challenge, in a way. This is going to be your unit. Sure, you can enforce the law. How, though, are we going to bring people closer together?

Mr. PATRICK. Well, Senator, I think that is both a very complicated and very simple problem. It is a complicated problem because in order to get to where we feel that which binds us is greater, in fact, than that which divides us requires an enormous amount of work, an enormous amount of rebuilding of trust among communities.

It is a simple problem, though, in the sense that I think when you get right down to it, as I tried to express in those remarks, we are human beings in common and we do all have simple, fundamental human reactions to problems that are so similar from one so-called group to another. And I think that every opportunity using, as I was saying earlier, the so-called bully pulpit of the position for which I have been nominated, that theme has to be reasserted and reaffirmed.

I think at the same time it is incumbent upon all of us, not just me if confirmed, but me if not confirmed, and on all of you to listen very carefully. There is a lot of talking going on, although I think we often talk past each other. There is not as much listening going on, and I think that is an important dimension of the solving of this problem as well.

Senator FEINSTEIN. Well, the reason I ask it is I believe you are going to be confirmed and I think it is a day that is going to call for some unusual and atypical remedies. You have lived the American dream; you are what it is all about. You started with very little. You have had the best American education can give you. You are articulate, you are handsome, you are young.

Mr. PATRICK. Stop, stop. [Laughter.]

Senator FEINSTEIN. You have the opportunity, I believe, to provide a unique level of leadership, and what I want to do is really challenge you to do that because, you know, I am one that believes, whether the man makes the times or the times make the man, we have got both, quite possibly, in you.

Mr. PATRICK. Thank you, Senator.

Senator HEFLIN. Do you want to make any comments about your colleagues? [Laughter.]

Mr. PATRICK. Well, Senator, I will accept that challenge if you promise to join me.

Senator FEINSTEIN. I will do my best, I promise you that.

Mr. PATRICK. Thank you.

Senator FEINSTEIN. Thank you, Mr. Chairman.

Senator KENNEDY. Senator Cohen?

OPENING STATEMENT OF SENATOR COHEN

Senator COHEN. Thank you, Mr. Chairman. I am not sure whether that was a rampant display of sexism or not. [Laughter.]

Senator COHEN. Let me welcome you and thank you for coming.

Mr. PATRICK. Thank you, Senator.

Senator COHEN. Let me also commend President Clinton for appointing you. He has made an outstanding choice. You will do an outstanding job.

Mr. PATRICK. Thank you.

Senator COHEN. To follow up on what Senator Feinstein was saying, I looked through your speech entitled "A Stone of Hope." In this speech you outline how you have, in fact, came up from the bottom, from a slum tenement in a segregated neighborhood, attending segregated schools, swimming in segregated pools. Now you are upper middle class, living in a comfortable home outside of the city of Boston; you have an upper middle-class family with all the opportunities that attend that.

Yet, in part of your speech you said, "Still, I feel less hope now than I remember feeling in 1963," and that was when you were 7 years old and listened to the speech of Martin Luther King, Jr. "I and legions of other African-Americans feel less of a sense of opportunity, less assured of our equality and less confident of fair treatment."

That statement struck home because you are not alone in expressing that. If you read Ellis Koss' book, "The Rage of the Privileged Class," for example, you say what is the problem. What is the

problem? You have made it. Didn't we, in fact, level the field back in 1954? Didn't we level it in 1964? Didn't we level it again a couple of years ago with the update of the Civil Rights Act?

The fact is that racism in this country still exists. It is deep-seated, it is here and it is not going away in the near future. Look at television, for example. There was a program that made a deep impression on me. The show took two college graduates, one white, one black, and sent them out. They were both properly dressed. Each had on a suit or a sport coat. Each was well-appearing. The young men were followed with cameras. First, they were followed to a store.

Mr. PATRICK. I remember this, yes.

Senator COHEN. What happened, of course, is the minute the young black man walked through, he was immediately followed by store personnel. There was an instantaneous reaction, "watch this one." Even though he was not threatening in any way, was well appearing, well spoken, well educated, all of the "wells," he was picked out to be followed.

He went to the car salesman. No one waited on him for close to a half hour. Even a black salesman did not wait on him. Of course, when the white individual came through, right away he was taken care of.

Finally, the last segment involved renting an apartment. To the black man, they said, "Sorry, you just missed it; we just rented the last one." Of course, 20 minutes later the white college grad showed up and they had an apartment available for him.

So what you said in your 1992 speech still obtains. Progress has been made in some regard, and yet a feeling of despair has enveloped many in the African-American community. Some are now turning to the Nation of Islam as a way of sustaining themselves spiritually—others see it in quite a different fashion than perhaps those within the black community do. I raise this because it is an extremely important position that you are about to hold and it is important that someone like you hold this position.

I read in last Sunday's Washington Post an article entitled "College Dorms Reflect Trend of Self-Segregation." The article discussed the trend on many of our college campuses for students to demand dormitories organized by race, ethnicity, sexual orientation, even drinkers and tea-totalers.

At Brown University, for example, they have a Hispanic house, a French house, a Slavic house, an East Asian house, and a German house. Because of the concerns that have been dividing the students, the university has halted the opening of such dormitories. The article noted that this self-segregation and separatist movement in housing is often accompanied by student demands for separate lounges, activities, and curricula.

There is a Brown University student who is white and he is quoted in the article as saying that, "Various racial and ethnic groups are separating themselves from everybody else, and yet complain when society separates them. Can you really have it both ways?" That is a good question. Can we really have it both ways? Is it more acceptable or beneficial for our society to allow a black or Hispanic house than to permit a white house.

This is an issue which we all must address. This is one of the most divisive issues that we have to confront in our society. W.E. DuBois said that he thought that the struggle of the 20th century would be that of color line. It will be the struggle of the 21st century as well—and there may be additions, such as ethnicity, religion, and gender—but the color-line struggle is going to remain.

In your speech, "A Stone of Hope," you remarked that we lack a national consensus on civil rights and we lack the will to seek one. If that is the case, how do we go about doing it when even you, given all that you have done and who you are, say that we lack a will to seek a consensus?

Mr. PATRICK. Let me respond to it this way first, Senator. Your remarks leading up to the question, I think, really put your finger on, I think, one of the great challenges facing the Nation, quite a bit broader than the responsibilities of the AAG for Civil Rights.

When I talked about less of a sense of hope today, I want you to understand that when I make those kinds of remarks it is because I am remembering that this is not just about me. I have had a measure of opportunity and a measure of success, I guess, but it is not just about me.

You look around and you see the same things I see. You see the explosion of resegregation in college campuses in the ways you have described. That is a subtle, difficult problem which I have seen up close from young men and women who have been host children of ours in our town who have been brought into our family and gone off to schools and struggled with these questions and make different kinds of choices.

I think that—and you see it again, if I may, in the ways in which some kinds of philosophies and some kinds of theories and some kinds of behavior seem to reach the crisis, or children in crisis in urban communities, particularly children of color, in ways that the old themes don't.

I have a real problem with the notion that we would abandon some of the themes that I was raised on and weaned on, and Dr. King and others, because I think they resonate so profoundly in American values, in basic American values shared by everyone. I think that one of the ways that you begin to address these problems, or one of the ways that I hope to try to address these problems is to confront them head-on.

I think we have got to face our problems, not dodge the question of race, not dodge the question of gender discrimination or discrimination against people with disabilities. We have to look them right in the eye, and from a law enforcement point of view we have to, it seems to me, approach these problems not like themes that have to be affirmed so much as problems that have to be solved. Then, through those problems, we have to reaffirm the large theme.

So, in other words, I think you come to it not as a philosopher, but as a problem-solver, and then you extrapolate from the solving of the problems the larger. That has been my experience growing up, and I think that the responsibility for solving these kinds of problems and addressing the divisions between us has got to go beyond any one person in any one job. It has to reside in all of us, particularly people in positions of public responsibility, it seems to me.

Senator COHEN. Thank you for your answer. I didn't mean to lay on your shoulders the entire problem confronting the country and expect you to solve it, but the statement was troubling to me because you do feel that sense of despair. Even, as you indicated, having come from the very bottom to near the top, you still feel that sense of the lack of equality, and you reflect a view that is shared by many, many who have not made it and will not make it.

You talked about a color-blind society. It is your belief that one day we will achieve that. I am not nearly as optimistic as you are about that. I am glad that Senator Moseley-Braun is here because you said don't assume that African Americans or any other minority are of one mind. We make that assumption so many times that the black community must speak with one voice. There are many voices, and we ought not to make that mistake.

Senator Moseley-Braun brought this out at a hearing that was well attended and not reported. It had to do with gangster rap, and I thought there were brilliant presentations with a variety and a diversity of opinion coming from the black community that was astonishing. The public should have seen that, and unfortunately no one saw it.

Mr. PATRICK. It is a very important point to see, though.

Senator COHEN. It was very important for everybody to see, and I hope that she will continue her effort and you will continue your effort to point out that there is great diversity within every community. The hope that we have is to somehow hold on to the diversity, but yet promote the unity that we need as Americans in this country.

Thank you, Mr. Chairman.

Mr. PATRICK. Thank you, Senator.

Senator KENNEDY. I wonder if Senator Heflin would yield to Carol Moseley-Braun.

Senator HEFLIN. Yes.

OPENING STATEMENT OF SENATOR MOSELEY-BRAUN

Senator MOSELEY-BRAUN. Senator Heflin is such a gentleman. He gives southern gentlemen a good name, I tell you. [Laughter.]

Thank you very much, Senator Heflin. And to Senator Cohen, thank you very much for your kind words.

I think this hearing is cause for great celebration. We finally, finally will have an AAG for Civil Rights, and that is so important to our country and so important to the people who rely on that Department for the protection of some very essential liberties and some essential rights, particularly coming 9 months or so after an important nomination to this post failed in controversy.

That was actually not my first, but my third controversial nomination. I thanked Chairman Biden, by the way, for that, but the fact is I have traditionally, as I told you when we met, Mr. Patrick, had a view of article II, section 2, of the Constitution that I believe keeps me from advocating for a nominee before the hearing has taken place, before the nomination has been put forward and we have had a chance to advise and consent, as the Constitution calls on us to do.

Mr. PATRICK. I understand.

Senator MOSELEY-BRAUN. But the good news is, being next to the last now, we have heard the testimony and I can tell you I am ready to jump for joy with your nomination. I am so proud of you, and I can tell you right now you have my unequivocal, enthusiastic support.

Your opening statement was probably the most poignant, the most moving statement, the most eloquent statement I have heard anyone make in my time here in the U.S. Senate, bar none.

Mr. PATRICK. Thank you.

Senator MOSELEY-BRAUN. It communicated the very values that I believe are so important to an office as important as this one is.

I am particularly optimistic about your nomination not only because of your credentials, and we have gone through that, but also the humanity that you have evidenced not only today in that eloquent statement, but also in your writings and what you have done before.

I was particularly taken with the speech that you made back in—I don't have the date here—the speech you made to Milton Academy in which you referred to yourself as a pragmatist with high ideals. I think that that is the core of what will be needed to move the agenda for the Civil Rights Division.

So rather than talking about the global issues, although I dare say I have yet to run into anyone whose views on these issues more closely parallel my own—and I am delighted for that, also, and so if I can ditto a lot of the things you have said today on the global issues, the larger issues having to do with the race in this country, I really want to talk specifically about the Department for a moment.

Without going into the numbers, there is a backlog in the Department, and this section has been accused of not being aggressive in the previous administrations in enforcing civil rights law on a wide range of subjects, everything from voting rights to fair lending and other subjects generally. So I would want to ask you as a general matter, what thoughts or what plans have you with regard to getting rid of the backlog, moving the Department forward, getting caught up and getting current with regard to the workload of the Civil Rights Division?

Mr. PATRICK. Well, Senator, again, if you will permit me to respond in a general way without having studied the allocation of resources, I think that the responsibility of the AAG for Civil Rights is to join with the other professionals in the Division and in the Department in a review of the allocation of resources and the development of a set of priorities, and that that has to take place first and quickly.

I also think that I just want to make the point that when I said that we can and we must do better, that was not intended as a criticism of the past. I think that the effort to enforce civil rights law and that the civil rights movement in general in the country was really nicely described by a good friend of mine who is a very young 50 when she talked about it as a relay race and that you take up where the last person left off and you try to move the ball a little bit further; try to take that torch to the next person. That is really what I think has to happen.

I have met now—I haven't spent a lot of time with them, but I have met Mr. Dunne, who was the previous AAG, and he is a very honorable man and he is as committed to these issues as I am committed to these issues. There may be changes around the margin, there may be changes of emphasis, but I think that we have to be clear that the direction forward is the only direction to go in.

Senator MOSELEY-BRAUN. One of the new initiatives in the Department was the development of an interagency task force on fair lending.

Mr. PATRICK. Yes.

Senator MOSELEY-BRAUN. In the statement that was made, I guess, very recently by Attorney General Reno she talked about the task force on lending which will continue in its efforts to provide further guidance to the banking industry. Specifically, the Federal Reserve Bank of Boston, in fact, did a study on lending practices and found that when you quantify all other factors, there is a 60-percent differential in lending rates for minorities, particularly African-Americans, than other groups; that is to say, everything else being equal, the minority is 60 percent more likely to be turned down for a loan than a non-African-American. That figure has been now confirmed in other subsequent studies having to do with lending activity.

I serve on the Banking Committee and I have had any number of CEOs and directors from banks come in and say, we want to make these loans, we want to get capital into these capital-starved communities, but we don't know where the disconnect is.

Clearly, the downside and the result of that disconnect is entire communities where there is no capital for job creation, there is no capital for housing development, there is no capital to provide the kind of hope and opportunity that people need to have. So this becomes a critical aspect, I think of our civil rights enforcement efforts as we go forward.

I guess my question to you is specifically what would you see as the kind of initiative that will be appropriate for the Civil Rights Division to undertake in order to help lending agencies and other parts of the financial services industry to get past the disconnect, to actually begin to undertake the kind of fair lending activity that will help us build and create communities and remove the discriminatory barriers to access to capital.

Mr. PATRICK. Well, Senator, I have had some direct experience in this from a matter that I worked on in Massachusetts. Senator Kennedy and I were talking about it earlier. I believe that using the authority in the Division under the Fair Housing Act, it is appropriate to target lending discrimination. It is also appropriate, and indeed responsible, to think about ways of targeting that sort of filing a lawsuit in the first instance.

In my experience, it is possible to get bankers to the table to try together to come up with creative solutions to these problems. In the Massachusetts matter that I was referring to, we changed a long- and well-established banking practice that had been very disruptive in the communities of color after 2 months of negotiation and never filed a lawsuit and the bank is thrilled about it, just as we are.

I think it is possible, but I also think that you have to be prepared to go to court and insist if you can't work out a solution. But, frequently, if you bring people together and get them to stop talking past each other—I don't mean to suggest that this is the solution in every case, but if you bring people together, in my experience, and get them to stop talking past each other and talking about the same problem and listening to each other's perception of the problem, then you see remarkable things result.

Senator MOSELEY-BRAUN. I couldn't agree with you more and, again, I would give you just my own experience talking with people in the banking and other sectors of the financial services industry who all say, we want to enforce CRA, we want to enforce community reinforcement, we want to get capital into these communities, we want to help housing re-development and housing development, we don't know what is wrong here.

A lot of times, I suspect that, again, talking past each other is one of the problems. The other problem may well be that what is happening at the top is not percolating to the loan officer that is sitting there taking an application from a person.

Mr. PATRICK. That is a related problem, yes.

Senator MOSELEY-BRAUN. And so I suppose I would just want to encourage your efforts in this regard and to suggest that the inter-agency task force make it a point to talk to and sit down with and consult with the other regulators in this area because I am convinced there must be strategies, there must be approaches that can be taken to make CRA, for example, not just words on a piece of paper, but actually give it some life that is focused on results and not just process and shuffling papers across a desk to make certain that our fair lending and fair housing laws are actually enforced and not just some global language in a statute book somewhere that does not filter down to that interaction that—well, Senator Cohen is gone now, but the interaction that Senator Cohen was talking about.

So I would just want to encourage your efforts in looking at these issues going to access to capital, access to opportunity, because I believe fundamentally that that is where the hope lies for communities that right now feel that they have been shut out of the mainstream.

Mr. PATRICK. I look forward to working with you, Senator.

Senator MOSELEY-BRAUN. Mr. Chairman, I have a statement I would like to include in the record.

Senator KENNEDY. It will be so included.

[The prepared statement of Senator Moseley-Braun follows:]

PREPARED STATEMENT OF SENATOR MOSELEY-BRAUN

Chairman Biden, I am pleased to be here today to hear the testimony of Mr. Deval Patrick, who has been nominated by the President to be the Assistant Attorney General for the Office of Civil Rights. Enforcement of our Nation's civil rights laws by the Justice Department is an absolute priority, so this hearing to discuss the administrative leadership of the civil division is therefore an important concern for all Americans, particularly in light of the legacy of 12 years of retrenchment and neglect of the civil rights agenda.

This committee and the issues we consider are so important that following my assignment to the Senate Judiciary Committee in January 1993, I established a policy that I personally feel is critical. I have, since January of last year, refrained from public comment regarding Presidential nominations referred to the Senate Judiciary

Committee prior to a full debate of the nominee's credentials and views at a confirmation hearing before the committee. I view my role as a member of this Committee the same as that of a judge who refrains from comment on a case before the court.

This said, I wish we could have been here considering this nomination 6 or 9 months ago. While I regret the delay, I don't think anyone who examines Deval Patrick's record can seriously doubt that President Clinton, unlike his predecessors, is truly committed to advancing the cause of civil rights in this country.

By now, we are all familiar with Mr. Patrick's background. Born in one of Chicago's toughest neighborhoods, Mr. Patrick was given the opportunity after 8th grade to attend Massachusetts' prestigious Milton Academy through a scholarship program entitled "A Better Change." Chicago's loss proved to be Massachusetts' gain. Mr. Patrick excelled at Milton and, upon graduation, went on to attend Harvard University, receiving first a bachelor's degree in English and American literature and then a law degree. While in law school, Mr. Patrick was elected head of the law school's legal aid bureau, providing the first indication of his lifelong commitment to equal justice for all.

The year following his graduation, Mr. Patrick served as judicial clerk for Federal Judge Stephen Reinhardt of the Ninth Circuit Court in Los Angeles. Upon completion of his clerkship, he most certainly could have had his pick of positions with high-paying, prestigious law firms. Instead, he chose to continue the work he had started at Harvard Law School by joining the NAACP legal defense fund, specializing on death penalty appeals and voting rights cases.

It is worth noting, Mr. Chairman, that one of the founders of the legal defense fund was the late Supreme Court Justice Thurgood Marshall. For as I reflect on the career of Mr. Patrick, I can't help but notice the similarities between his career and the career of Justice Marshall, particularly in his dedication to ensuring that no individual is denied their fundamental rights under the law on the basis of their race, religion, gender or mental or physical disabilities.

Mr. Patrick's tenure with the legal defense fund gives him the real life experience on the front lines of the civil rights battle that was all too often lacking in the civil rights nominees of the previous administrations. I would also note that it was his work with the LDF that gave Mr. Patrick the opportunity to sue the man who has nominated him, then—Arkansas Governor Bill Clinton, in a dispute over voting rights in Arkansas. Happily the case was settled out of court, and Mr. Clinton does not hold any grudges, or we would not have this nominee before us today.

After leaving the legal defense fund, Mr. Patrick joined the prestigious Boston law firm of Hill & Barlow. However, the change in employers did not change Mr. Patrick's fundamental commitment to equal justice. While at Hill & Barlow, he has devoted approximately 30 percent of this time to pro bono cases, including suits on behalf of African-American borrowers who were the victims of illegal sales tactics and low income housing tenants who were faced with the destruction of their apartments.

Before we begin, I must tell the Committee I was very impressed with the remarks Mr. Patrick made when he accepted the nomination to fill the vital position of Assistant Attorney General for Civil Rights. In his speech at the White House, Mr. Patrick stated that he was there standing on the shoulders of the "courageous advocates of every type and kind who have had the guts to stand up and give the Constitution life." I would submit, Mr. Chairman, that Mr. Patrick himself is exactly the type of person he has described—a courageous advocate who has stood up and give the Constitution life. I welcome him before this committee, and I look forward to hearing his testimony here today. It is my hope that this committee, and the full Senate, can act quickly on this nomination.

Senator KENNEDY. Senator Grassley?

OPENING STATEMENT OF SENATOR GRASSLEY

Senator GRASSLEY. Thank you.

Congratulations for your appointment.

Mr. PATRICK. Thank you, Senator.

Senator GRASSLEY. The first thing that I would bring up would be not to ask you a question or even ask you to comment on it, but just like to encourage you to maybe look at and if there is a way for you to be involved, to be involved, and that is congressional cov-

erage by Members of Congress of laws that we have exempted ourselves from in the past.

Three years ago I was able to get civil rights laws applied to Congress. Now Senator Lieberman and I have drafted a bill that will encompass all those laws we have exempted ourselves from. Our bill provides, even for the civil rights laws that we have already applied to Congress for enforcement mechanisms that more closely parallel those existing in the private sector. I think the environment is good this year for this bill to pass; at least that is what we hear from the grass roots. I suppose what we decide here in Congress is sometimes different. So I would just implore you to take a look at that.

Mr. PATRICK. I am generally aware of the bill, Senator.

Senator GRASSLEY. I understand that you have spoken this morning and in your speeches about the values that unite us as Americans. That is an especially important quality that you bring to the job: an understanding that there is so much more that unites us as participants in our democracy than divides us; you rightly note that our work in making all that America has to offer, available to all of our citizens, is not yet done. You will be responsible, of course, for opening doors for those shut out from society.

What I would like to ask you about is what happens when efforts to break down barriers for minorities have the effect of discriminating against nonminorities. I know my colleagues may have raised this. I hope I cover the issue from a different perspective.

I would like to ask you about your views on the Fourteenth Amendment Equal Protection Clause. I would like to emphasize that it is your views that I would like to have you share with us: how you personally approach these issues and how those views might reflect on how you are going to approach the job.

Under the Equal Protection Clause, should local and State government discrimination against racial minorities be judged by the same standard of review as discrimination against nonminorities, or should a classification that prefers minorities and has a negative impact on nonminorities be judged by a less rigorous standard by our courts?

Mr. PATRICK. Well, Senator, if I understand your question, it speaks generally to the extent to which race can and should be taken into account in addressing a problem of proven discrimination, and that is an issue that the Supreme Court, I think, has been struggling with and has given a great deal of guidance to us about.

Senator GRASSLEY. I feel that we have a fair understanding of where the Court is. I want to know how you personally view this and how that might impact upon policy you make in your present position.

Mr. PATRICK. I understand, Senator. Well, I view my position, I was saying a little while ago, if confirmed, as a law enforcement position, one where it is my responsibility to take cases one at a time, to evaluate the law and the facts of each case and make an appropriate judgment under those cases.

I think it is also incumbent upon me and anyone else who presumes to hold this post to understand and to remember at all times that the Constitution and the Federal laws extend to all citizens,

that they are not—I don't view this job as a constituent job, if you will. I understand this job, as I said a moment ago, to be a law enforcement job and that we have to be prepared to look square in the eye and be sensitive to the interests of all parties in trying to solve problems.

Senator GRASSLEY. As you understand the standards that the Supreme Court has set for discrimination by State and local governments, do you think those standards are the proper standards or do you think they ought to change? That is the real point of my question.

Mr. PATRICK. Well, I am not sure I am going to presume an answer to the question whether they ought to change. I mean, they are the law of the land and I think that is what I have to deal with if confirmed.

Senator GRASSLEY. Well, then, you would basically take the position that the standard of review for discrimination against racial minorities should be judged the same as discrimination against nonminorities?

Mr. PATRICK. I believe that the standard of review in very general terms, Senator, under the fourteenth amendment is that the highest standard goes to any racial classification right now. I believe that is so.

Senator GRASSLEY. What is your understanding of the Supreme Court precedent on this issue? Do you find Richmond and Wygant to be good and operative law?

Mr. PATRICK. Well, I think Richmond and Wygant are operative law and the law that, if confirmed, I have got to be pay attention to and be guided by.

Senator GRASSLEY. How do you feel about—I use the word “goodness” about the Richmond and the Wygant—

Mr. PATRICK. You mean do I think they were rightly decided? Is that what you are getting at?

Senator GRASSLEY. Well, more importantly, I think the value judgment—I put in the word “good,” or I suppose “bad” would be the other way to look at it—might tell me how you approach the policies that are determined by Richmond and Wygant and whether, as you are involved in enforcing the law, that would be your value judgment as you approach your law enforcement job.

Mr. PATRICK. Well, I will certainly pledge to you not to ignore any controlling precedent of the Supreme Court or of the Federal law simply because I don't happen to like it or agree with it. I think in the case of the Richmond case, if I remember correctly, it was a deeply divided Court that ultimately reaffirmed in general terms a principle that has been articulated in more than a dozen so-called affirmative cases over the years, which is that affirmative action, where it is lawful, has to be limited to certain circumstances, has to be flexible, has to allow for the consideration of a variety of factors, and has to be reviewed from time to time to consider its impact on nonminorities. As I said earlier, Senator, that is the law and the law by which I have no choice but to be guided.

Senator GRASSLEY. As a reminder, Justice O'Connor said, writing for herself, as well as Kennedy, Rehnquist and White, in Richmond, “The standard of review under the Equal Protection Clause

is not dependent upon the race of those burdened or benefitted by a particular classification." Justice Scalva concurred, and said, "Strict scrutiny must be applied to all government classifications by race."

Mr. PATRICK. I think that is what I was saying, or trying to say, Senator.

Senator GRASSLEY. Well, thank you very much. You have answered very explicitly. I appreciate that.

Mr. PATRICK. Thank you, Senator.

Senator GRASSLEY. No doubt, you will, if you are confirmed, be asked by Solicitor General Days for your advice from time to time on civil rights cases that he might argue before the Supreme Court. Would you consider recommending that the standard for judging State and local minority preference programs be less stringent than the standard used to judge State and local government action which discriminates against minorities? Under what circumstances would you seek a remedy that includes a preference for members of a minority?

Mr. PATRICK. That is a hard question for me to answer in the abstract, Senator, because I think that the best use of my talents and the most responsible use of my talents in this job is to take the cases on a case-by-case basis and make judgments at that time.

I am respectful of the Supreme Court precedent on this subject and I think that a consideration of whether to attack an existing precedent has got to be motivated by the particular circumstances in a particular case. So it is hard for me to address that in a general way, Senator, if you please.

Senator GRASSLEY. In 1976, the Supreme Court held in *Washington v. Davis* that statistics alone are not enough to prove race discrimination under the 14th amendment equal protection clause. Rather, aggrieved minorities must show intention to discriminate by the State and local government. Now, to my mind, this is a sound decision, since governments make classifications quite routinely.

Are there any circumstances that you could identify which might give rise to a disparate impact claim under the equal protection clause? In other words, could you see yourself urging the Solicitor General to seek reconsideration of this principle?

Mr. PATRICK. Well, Senator, I think the Court has been fairly clear that intentional discrimination has to be proved to make out a 14th amendment claim. That doesn't mean that numbers are irrelevant. They are but one of a number of factors that have to be considered. That is a practical resolution to a thorny problem.

Of course, it is a little different when you begin to talk about the Federal statutes because there are different kinds of proof, as you know, permitted for discrimination depending on the statute, and that may not necessarily be limited to proof of intentional discrimination.

I think that for the time being, in the absence of a particular fact pattern with a particularly compelling set of circumstances, that law is good law and should be permitted to stand. But I think, as I said earlier, what good lawyers do is take cases one at a time.

Senator GRASSLEY. Thank you.

Mr. PATRICK. Thank you, Senator.

Senator KENNEDY. Senator Heflin?

OPENING STATEMENT OF SENATOR HEFLIN

Senator HEFLIN. I will make my remarks short since I know the Chairman and I have to be in another place and are supposed to have been there already.

I think you are an excellent choice.

Mr. PATRICK. Thank you, Senator.

Senator HEFLIN. I think most of the questions I had in mind have already been propounded to you and you answered. However, there is one element I think you are uniquely qualified for. You have been in the forefront of a lot of trials and you have seen trial tactics which have been used. I remember certain testimony on certain nominations that you gave, and there are still career U.S. attorney employees who are in those offices and attorneys themselves who resort still to certain types of tactics.

Now, I realize the appellate process takes care of some of this.

Mr. PATRICK. Some, but not all.

Senator HEFLIN. Some. The Office of Professional Responsibility has some, but it seems to me that there is a role with your Civil Rights Division in the Department of Justice by which there could be some review of some continuing and frequent abuses that have occurred. I would like to talk to you about several specific cases relative to that which I think have occurred. You want everybody to have due process, but there are some problems in that area that I think need to be addressed and I think you are uniquely qualified to look at that.

Mr. PATRICK. I look forward to working with you, Senator. Thank you.

Senator HEFLIN. All right. I will terminate it there.

Senator HATCH. Mr. Chairman, the last questioner is Senator Specter. He asked us to hold until he could get here.

Do you need a break?

Mr. PATRICK. Would it be all right if we took a break?

Senator HATCH. What do you say, Mr. Chairman?

Senator KENNEDY. We will take a quick—

Mr. PATRICK. Five minutes?

Senator KENNEDY. Why don't I just ask one quick question, and that is on the Americans With Disabilities Act, will you let us know whether you are getting the sufficient resources and support to make sure that that has become a reality in our society?

Mr. PATRICK. Absolutely, Senator.

Senator KENNEDY. We had strong bipartisan support in passing it and the Justice Department in the previous administration worked through development of the regulations. We want to make sure you have all of the support to make sure that it becomes a reality.

Senator HATCH. Let us take a 5-minute break.

Senator KENNEDY. We will take a 5-minute break. Just before recessing, I am going to use this time to recognize Judge Lindsay from Massachusetts, who is here today, and his wife, Cheryl, is here today. We had hearings in strong support for the Judge and he is busily engaged up there in Massachusetts doing the good

work. I know he is a good personal friend of our nominee, and I certainly want to say how glad we are to have him here.

Mike Greco is a distinguished lawyer. He is the American Bar Association's representative in terms of judicial selection and has been very constructive and positive in helping us in Massachusetts to select the best and make sure the best are going to serve on the courts.

Ms. Patrick, I missed the time when you were introduced here and I just want to say how delighted I am personally to see you here, a good friend, and we are just appreciative of your presence here.

We will take a very brief break here and wait for Senator Specter. We stand in recess.

[Recess.]

Senator KENNEDY. We will come back to order.

Senator Specter.

OPENING STATEMENT OF SENATOR SPECTER

Senator SPECTER. Thank you, Mr. Chairman. I appreciate your accommodating me with a short recess. This is my third trip to these hearings today to participate in the questioning. I have long been an advocate of the early-bird rule, Mr. Patrick, which means that some committees question in order of arrival as opposed to order of seniority. I am just about at the break point. This is my 14th year and I am not sure whether I want to stay with the advocacy of the early-bird rule or rely on seniority. I have a hunch that I will probably be effective in getting the rule changed at just about the wrong time, and this is sort of illustrative of it.

I am glad to see this hearing take place. It is long past due to have a hearing for the Assistant Attorney General in charge of the Civil Rights Division. I believe it is a very, very important Division, and we are into the 14th month of the administration without an Assistant Attorney General.

I was a little surprised in the materials which were circulated about you to see the sheet touting the progress that has been made in civil rights in the absence of an Assistant Attorney General. I note a representation here that there has been a filing of a record number of cases and a record number of investigations launched, et cetera. I was pleased when I met with you informally that you knew nothing about this, because I think that there is nothing that substitutes for a vigorous prosecutor who is running the Civil Rights Division.

I, for one, urge you to be very vigorous in your pursuit of cases where there is evidence—and that is the hard thing to find, the fact-finding—of violations of civil rights. During my 14 years here, we have spent a lot of time on the Voting Rights Act and the Civil Rights Act, and I want to give you a couple of illustrations as to the kinds of cases that I think require activity by the Civil Rights Division.

One of them, I discussed with you yesterday, and another one that I want to bring up today involves an investigation into violations of both the Civil Rights and Voting Rights Act in the city of Philadelphia in the last election. This received national attention because the absentee ballots made a difference and there was evi-

dence of widespread fraud on a subject that I have had intimate familiarity with from my days as district attorney of Philadelphia.

I may be challenged on this, but I think Philadelphia is a tougher city than Boston when it comes to vote fraud. No challenge here. [Laughter.]

Senator SPECTER. A Federal judge invalidated all of the absentee ballots because of a pervasive evidence of fraud, and I asked the Attorney General to conduct an investigation under both voting rights and civil rights. It took some time to get it started and the street talk is that not much is being done. Whether that is accurate or not, I do not know, but the street talk arises when there doesn't appear to be people asking questions on the street about the investigation.

The city officials and local law enforcement took absolutely no action on the matter, with very, very heavy political overtones. The Federal judge, Judge Newcomer, found that there was complicity and has really pretty much laid out an indictment on conspiracy as to many people practically self-executing on its face.

If confirmed, I would hope that you would make that a priority item because I think a unique time for vigorous civil rights and voting rights enforcement is when local law enforcement has broken down and local law enforcement doesn't take it up, whether it is a matter of bias or bigotry or politics.

Mr. PATRICK. I agree with you.

Senator SPECTER. Would you care to amplify your agreement with me?

Mr. PATRICK. Well, Senator, I won't comment on the investigation because I know it is a pending investigation, and because I don't have a job in the Justice Department yet, I don't know about the status.

Senator SPECTER. How do you know it is a pending investigation?

Mr. PATRICK. Well, I learned in my preparations that there was a pending investigation. I believe it was in the newspapers as well, or at least that there had been an inquiry by you, if not others, into the problem. I guess that is what I really know.

I think that the misuse of absentee ballots is as serious a problem as any other arising under the Voting Rights Act and implicating the integrity of the vote process, and I think that should be a priority of the Division, consistent with available resources and some of the other considerations that you raised with respect to whether the local authorities are adequately addressing it.

Senator SPECTER. Well, I would hope that you wouldn't look too closely at available resources on a priority matter of this sort. I think whatever resources are present ought to be directed to it because it involves the fundamental integrity of voting rights. It happened to be the determinative State senator which will control which party has the State Senate, but that is really not the critical factor.

The critical factor is that there is a pattern shown where absentee ballots are taken to registered voters who sign them in blank, and when there is a mark on some on the Democratic column for a straight-party ticket—and it could be a Republican as well. I arrested both Republicans and Democrats when I was district attorney of Philadelphia on vote fraud charges. They say that the des-

ignation of "Democrat" was made because that is their party, when, in fact, that is a false and fraudulent statement. The cross by the Democrat box was to have a straight party vote. People were registered as voting absentee who never saw the ballots, and there were forgeries as well.

I look forward to a report from you if, and when you are back here in one of our oversight hearings on that case.

Mr. PATRICK. I look forward to that, Senator.

Senator SPECTER. The next case I want to talk to you about is—

Mr. PATRICK. On a lot of levels. [Laughter.]

Senator SPECTER. I am sorry. I didn't hear that.

Mr. PATRICK. I said, on a lot of levels, I look forward to it.

Senator SPECTER. OK, fine. The next case I want to talk to you about which I mentioned to you briefly in our meeting in advance of the hearing is the MOVE case. In this case, many people were killed in Philadelphia when there was a police action which resulted in the bombing of a house in west Philadelphia and the destruction of an entire block.

That event occurred on May 13, 1985, and I tried to get the then Attorney General to move on the case and I have tried to get a succession of assistant attorneys general who came in for hearings here. The local prosecutor declined to act. I said then and would repeat now that it seemed to me that there should have been criminal prosecutions against a wide variety of local officials. Had I been district attorney, I would have done that.

That was a case, it seemed to me, which cried out for intervention from Washington, from the Civil Rights Division. Now, that case can't come before you so you have a little more latitude on commenting on that, but my question to you is, is that the kind of a case that you would give high priority for the Civil Rights Division resources?

Mr. PATRICK. Well, Senator, I think what I can pledge to you is that every case will be taken on its merits and get the full attention of the Division. I don't know enough about the case, not having been a part of any investigation, to know whether it is a case that would have warranted a prosecution out of the Division, but it certainly would have warranted the attention of the Division with respect to investigation.

Senator SPECTER. Well, the case involved a militant group which resisted efforts by law enforcement officials to get them to leave a building.

Mr. PATRICK. Right; I remember that from the newspapers.

Senator SPECTER. And then the evidence showed that there was force used vastly beyond the reasonable force necessary under the circumstances. The evidence also showed that a bomb was actually dropped from a helicopter, an incendiary, and that the fire was not put out when there was an opportunity to do so.

Now, that is only a thumb-nail description, but what kind of considerations—if you are not prepared to say that that would receive top priority from you as Assistant Attorney General in charge of the Civil Rights Division—what kinds of factors would go into your thinking as to whether you would initiate an investigation and prosecution?

Mr. PATRICK. Well, the first factor I would have to consider is whether the Division had jurisdiction over that kind of problem, whether the criminal section had an appropriate theory grounded in statutes that permitted the Division to become involved.

Senator SPECTER. You mean the Civil Rights Division, not the Criminal Division?

Mr. PATRICK. That is right, that is exactly right, the Civil Rights Division as distinct from the Criminal Division. So, that is the first thing, and I am not yet expert enough to say whether there was at the time jurisdiction under the civil rights laws for that problem, But that is the first consideration.

The second consideration, then, would be what are the priorities of the Division as a whole at the time and what are the complementary resources on the local level that are being used to investigate the problem and to deal with the problem, because I agree with you, Senator, when you say the Federal jurisdiction ought in many circumstances to be reserved for those situations where the State has not, for whatever reason, been able to deal with the problem, or the local authorities haven't been able to deal with the problem.

So those are some of the kinds of considerations, but you know from your own experience as a prosecutor that you take cases one at a time and you don't presuppose, or I don't think you presuppose as a law enforcement officer in a hypothetical sense where you are going to jump in and where you aren't.

I can assure you that if I am confirmed, I am going to be open to referrals of cases from all sources and that we will approach referrals in as professional and serious a manner as humanly possible.

Senator SPECTER. I have just one more comment and a very brief question, if I may proceed to that. When you were representing a party in the McCleskey case that dealt with the issue of discriminatory practices, one which has been raised earlier in the hearing, I view that as your advocate's role. And I believe that the death penalty is an effective deterrent and a very useful weapon in law enforcement, but I think it has to be very, very carefully exercised and we have to use extreme caution that it not be done in a discriminatory manner.

The advances since *Furman v. Georgia* in 1972 where there has to be a showing of aggravating circumstances and the admission of mitigating circumstances to make a judgment on the death penalty are very important because if it is overused and abused, I think it will be lost.

We had very thorough consideration of the McCleskey case which time does not permit going into today, but I would be interested in a final question if you would care to respond as to whether you think that the death penalty is an appropriate punishment in the certain selected number of cases involving aggravated circumstances and heinous murders.

Mr. PATRICK. In general or within the jurisdiction of the Civil Rights Division, Senator?

Senator SPECTER. In general.

Mr. PATRICK. Well, you know from our conversation and from the background materials that I have very, very serious reservations

about the administration of capital punishment, and I think you and I are of a similar mind on that point, which is that it is only as good as the fairness with which it is administered. But I think it is also clear in my mind that what I have been nominated to do is enforce the law and that my personal views have to be put aside.

There are many cases, including ones I have been involved in, where the visceral feeling is one in which you just want to tear the defendant limb from limb, but I think that the judgments incumbent upon a law enforcement officer have to be approached without that kind of passion and have to take into account the lawful factors that you have enumerated, Senator. I think if I am given this opportunity and am faced with that prospect, I can do my duty.

Senator SPECTER. Well, I would never want to see a defendant torn limb from limb. What I would like to see is the full weight of the law being brought to bear, and I think the question on the death penalty, whether you favor it, has some relevancy to the approach of a law enforcement officer not germane directly to what the civil rights law enforcement is, but I think it is a fair question to ask and that is why I asked it.

Aside from the issue as to whether the law calls for it, which it does, there is vast discretion, but not under the civil rights laws. There is no death penalty called for and if that is as much as you care to say about it, that is OK with me.

Mr. PATRICK. I think that is all I can say right now, Senator.

Senator SPECTER. OK, thank you very much.

Mr. PATRICK. Thank you.

Senator SPECTER. Thank you, Mr. Chairman.

Senator KENNEDY. Thank you very much.

We have a statement from Senator Leahy that he desires to have in the record, and also a statement from the Lawyers' Committee for Civil Rights which we will include in the record at this point.

[The prepared statements of Senator Leahy and the Lawyers' Committee for Civil Rights Under Law follow:]

PREPARED STATEMENT OF SENATOR LEAHY

Mr. Patrick, welcome to the Senate Judiciary Committee. Let me commend you on the journey that has brought you to the place you now find yourself. Your early life was spent in the shadow of housing projects in Chicago. From there, you worked your way to Harvard College and Harvard Law School; you distinguished yourself fighting for the rights of the disadvantaged with the NAACP Legal Defense Fund; your legal excellence earned you a partnership at a prestigious Boston law firm.

Your exceptional journey has led to this nomination to be Assistant Attorney General for Civil Rights. This is a position with great potential. It is a position that embodies one of our highest ideals—that the Constitution and law are intended to protect all Americans equally. It is a position that provides great opportunity to heal wounds and end divisiveness.

Civil rights issues are among the most important problems this country faces. It is an area where the right person can make a world of difference. Looking at your abilities and your experience, you appear to be that person.

I look forward to hearing your views on these issues during today's hearing, and to working with you after you are confirmed.

PREPARED STATEMENT OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

The Lawyers' Committee for Civil Rights Under Law unqualifiedly endorses the nomination of Deval L. Patrick for the position of Assistant Attorney General, Civil Rights Division, of the United States Department of Justice. Mr. Patrick is extraordinarily well qualified to hold this position and we urge the Senate to confirm him.

The Lawyers' Committee for Civil Rights Under Law is a national civil rights organization that was formed at the request of President John F. Kennedy in 1963 to involve the private bar in the enforcement and protection of the civil rights of Americans. Presidents Johnson, Nixon, Ford, Carter and Clinton have asked the Committee to continue that work. The bi-partisan Board of the Lawyers' Committee includes former Attorneys General, Deputy Attorneys General, Solicitors General, Assistant Attorneys General for Civil Rights, former and current presidents of the American Bar Association and other leading members of the private bar.

The Lawyers' Committee has, for the past thirty years, involved thousands of members of the private bar in providing *pro bono* legal services in significant civil rights cases, involving such wide-ranging matters as employment discrimination, voting rights, school desegregation, housing discrimination and municipal services. Mr. Patrick generously has provided his *pro bono* services in this continuing effort to protect the civil rights of all Americans and secure the rule of law, in accordance with the highest traditions of public service of the bar.

The position of Assistant Attorney General for the Civil Rights Division is of the utmost importance in enforcing our nation's civil rights laws. It is imperative that the leader of this division possess not only the highest legal skills, but also a commitment to enforcing the civil rights laws in a manner which mitigates divisions and polarization in our society.

In its thirty year history, this is the first occasion on which the Lawyers' Committee has affirmatively endorsed a nomination for a federal executive position. The Lawyers' Committee expresses its support for the nomination of Mr. Patrick because of its high regard for him resulting from his extraordinarily capable and important work on matters handled in conjunction with the Lawyers' Committee, and also due to the urgent need to fill this position, which has been vacant for fourteen months.

Mr. Patrick is highly qualified for the position of Assistant Attorney General for Civil Rights by his personal background, intellect, education, professional accomplishments, public and community service, and strong record of *pro bono* legal services. Mr. Patrick brings important experience in civil rights enforcement, as well as a broad perspective on our legal system, to the position. Mr. Patrick's personal background, overcoming poverty and disadvantage to graduate from Harvard College and Harvard Law School, has provided him with a sound understanding of obstacles and opportunities in American life. His clerkship with Judge Reinhardt of the Ninth Circuit Court of Appeals has afforded him a view on the role of a neutral decisionmaker in determining legal disputes. His tenure at the NAACP Legal Defense and Educational Fund brought him substantive knowledge of our nation's civil rights laws and valuable, specific experience in litigating matters of racial discrimination, including voting rights and application of the death penalty. Becoming a partner at the Boston law firm of Hill and Barlow, Mr. Patrick has been in the vanguard of African Americans entering the realm of large corporate law firms. In addition to handling complex litigation on behalf of commercial clients, Mr. Patrick donated substantial *pro bono* legal services in cases on behalf of the Lawyers' Committee and other civil rights organizations.

In his services on behalf of the Lawyers' Committee and its Boston affiliate, the Lawyers' Committee for Civil Rights of the Boston Bar Association, Mr. Patrick has been an effective and successful advocate for civil rights. Mr. Patrick has rendered truly exceptional *pro bono* services in three important cases involving fair housing, lending discrimination and discrimination in the selection of jurors.

These cases, together with his other work, illustrate Mr. Patrick's skill, experience and commitment to civil rights and the rule of law. He has helped to invigorate our nation's commitment to equal justice under law. The Lawyers' Committee is confident that he will provide the leadership needed for sound and effective civil rights enforcement by the Department of Justice.

Accordingly, the Lawyers' Committee for Civil Rights Under Law strongly encourages the United States Senate to confirm Mr. Patrick as Assistant Attorney General for the Civil Rights Division of the United States Department of Justice.

Senator KENNEDY. If there are no other questions, the committee stands—

Senator HATCH. Could I say one thing, Mr. Chairman?

Senator KENNEDY. Yes.

Senator HATCH. I would suggest that the committee schedule Mr. Patrick's markup as soon as we can. You have acquitted yourself well here today, as I expected you to do.

Mr. PATRICK. Thank you, Senator.

Senator HATCH. We need this position filled. It has been left open for far too long, and we want to wish you the best.

Mr. PATRICK. Thank you, Senator. I appreciate it.

Senator KENNEDY. Picking up on what the ranking member provided, we just had the hearing on the Deputy Secretary of Defense, who also happens to be from Massachusetts, earlier today and the chairman of that committee indicated that they were prepared to report it out this afternoon after a vote and actually pass him out the same day.

This will be something that will be left up to the chairman of the committee and the ranking minority member, but if we were to follow that procedure, I would certainly not object. [Laughter.]

Senator KENNEDY. I want to thank you very much. It really is with great personal pride to have the opportunity to both present you to this committee and also to hear your responses to a wide range of different, substantive matters. I was an enthusiastic supporter for your nomination for this position before, and I think anyone that has heard or listened to your responses to these questions must have a great deal of reassurance about the quality of the leadership that will be provided in the Civil Rights Division.

I congratulate you and we look forward to early, positive consideration of your nomination.

Mr. PATRICK. Thank you, Senator.

Senator KENNEDY. The committee stands adjourned.

[Whereupon, at 1:00 p.m., the committee was adjourned.]

[Submissions for the record follows:]

SUBMISSIONS FOR THE RECORD

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).

DEVAL L. PATRICK

2. Address: List current place of residence and office address(es).

Residence: 75 Hinckley Road
Milton, MA 02186

Office: Hill & Barlow,
a Professional Corporation
One International Place
Boston, MA 02110

3. Date and Place of Birth.

July 31, 1956
Chicago, Illinois

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Married to Diane Bemus Patrick, Esq.
Director of Human Resources
Harvard University
Holyoke Center 655
1350 Massachusetts Avenue
Cambridge, MA 02138

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

1974-1978 Harvard College
A.B. cum laude, June 1978

1979-1982 Harvard Law School
J.D., June 1982

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

- 1986-present HILL & BARLOW, Boston, MA (associate; partner/member; duties include managing active caseload, supervising and evaluating associates, former membership on Pro Bono and Hiring Committees)
- 1983-1986 NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, New York, NY (staff attorney; duties included managing active caseload, hiring, supervising and evaluating summer law clerks, evaluating and reorganizing student scholarship program)
- 1982-1983 HON. STEPHEN REINHARDT, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, Los Angeles, CA (law clerk; duties included drafting bench memoranda and appellate decisions for the judge and hiring, supervising and evaluating law students for the judge's externship program with area law schools.
- Summer, 1981 HELLER, EHRMAN, WHITE & MCAULIFFE, San Francisco, CA (summer associate)
- Summer, 1981 SQUIRE, SANDERS & DEMPSEY, Washington, DC (summer associate)
- Summer, 1980 WINSTON & STRAWN, Chicago, IL (summer associate)
- Sept., 1978- UNITED NATIONS-INTERNATIONAL LABOR
Feb., 1979 ORGANIZATION, YOUTH TRAINING PROJECT, Khartoum, Sudan (field researcher)
- May, 1979 UNITED STATES CONSULATE, Kaduna, Nigeria (consular assistant)
- Summers, FIRST NATIONAL BANK OF BOSTON, Boston, MA
1977-79 (summer intern)

Current Directorships, etc.

- 1985-present MILTON ACADEMY, Milton, MA (Trustee; member, Executive Committee; chair, Long Range Planning Committee)
- 1990-present NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., New York, NY (Director; member, Executive Committee; chair, New England Committee)

- 1991-present MILTON HOSPITAL, Milton, MA (Corporator)
- 1992-present BOYS AND GIRLS CLUBS OF BOSTON, Boston, MA (Overseer)
- 1992-present HORIZONS FOR YOUTH, Boston, MA (Director)
- 1993-present WGBH, Boston, MA (Overseer)
- 1993-present HARVARD ALUMNI ASSOCIATION, Cambridge, MA (Director)
- 1993-present BOSTON BAR ASSOCIATION COUNCIL, Boston, MA (member)

Former Directorships, etc.

- 1990-1991 PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS, Boston, MA (Director)
- 1990-1991 THOMPSON'S ISLAND OUTWARD BOUND SCHOOL, Boston, MA (Director; member, Executive Committee)
- 1988-1990 HARVARD UNIVERSITY ADVISORY COMMITTEE ON SHAREHOLDER RESPONSIBILITY, Cambridge, MA (member)
- 1986-1990 MELLON PUBLIC INTEREST LAW FELLOWSHIP, NAACP-LDF, New York, NY (chair, Selection Committee)
- 1979-1984 MICHAEL CLARK ROCKEFELLER MEMORIAL FELLOWSHIP, Harvard College, Cambridge, MA (member, Selection Committee)

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

George S. Leisure Award for Excellence in Advocacy, Harvard Law School (1981). Michael Clark Rockefeller Memorial Travelling Fellowship Award, Harvard College (1978-79) (worked and travelled in East and West Africa). Lt. George

C. Lee, Jr. Memorial Award, Harvard College (1976-78).
 Harvard Club of Chicago Scholar, Harvard College (1975).
 R.F. Herrick Class of 1916 Scholarship Award, Harvard
 College (1975). Harvard College Dean's List (1974-78).
 National Merit Outstanding Negro Commendation (1974).

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Vice Chair, Mass. Judicial Nominating Council (1991-1993);
 member, Committee to Evaluate the Criminal Justice Act Plan
 in the District of Massachusetts (1992-1993).

Member, American Bar Association; member, National Bar
 Association; member, Massachusetts Bar Association; member,
 Boston Bar Association; member, ABA Conference of Minority
 Partners in Majority/Corporate Law Firms.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

I believe that the following organizations to which I belong have been active in public advocacy, if not lobbying:
 American Bar Association, National Bar Association,
 Massachusetts Bar Association and Boston Bar Association.

I am also a member of the Board of Directors of the NAACP Legal Defense and Educational Fund, Inc., which is sometimes called upon to advise the Congress on proposed legislation bearing on civil rights. If confirmed, I intend to resign from this board to avoid any actual or apparent conflict of interest. I will seek advice from the Ethics Council of the Department of Justice on whether other resignations are warranted.

11. **Court Admission:** List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Admitted to practice in California (December 12, 1983); District of Columbia (October 29, 1985); and Massachusetts (June 10, 1987). Also admitted to practice before the United States Supreme Court (February 22, 1988); the United States Courts of Appeal for the First (November 2, 1987), Fifth (February 6, 1984), Ninth (December 14, 1983) and Eleventh (February 16, 1984) Circuits; and the U.S. District Courts for the District of Massachusetts (October 19, 1987) and the Central District of California (December 14, 1983). I have been admitted in other district courts pro hac vice.

12. **Published Writings:** List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

My only published material consists of the foreword to a book entitled, Journeys & Reflections: 25 Years of the Michael C. Rockefeller Memorial Fellowship, a copy of which is attached. Copies of the following speeches which bear on constitutional law or legal policy and testimony are also attached:

- Testimony - Jefferson Sessions Hearing
- Opening Remarks for 1991 Boston Anniversary Dinner
NAACP Legal Defense Fund
December 6, 1991
- Remarks made at annual Boston luncheon of the NAACP Legal Defense and Educational Fund
May, 1992
- A Stone of Hope, 1992
- Opening Remarks for 1992 Boston Anniversary Dinner
NAACP Legal Defense Fund
October 29, 1992

- ABA Individual Rights and Responsibilities Section Panel:
"The Death Penalty: Can It Be Administered Fairly?"
February 5, 1993
 - Commencement Address, Milton Academy
June 11, 1993
 - Remarks to Anti-Defamation League Luncheon
October 5, 1993, Mintz, Levin, Boston, MA
 - NAACP Legal Defense Fund Anniversary Dinner
October 21, 1993, Park Plaza Hotel, Boston, MA
 - Introduction of Mark Roosevelt for Fundraising Event
November 15, 1993, Park Plaza Hotel, Boston, MA
 - Tribute to Reg Lindsay, Charles Street Church
January 5, 1994
 - Town of Braintree, Massachusetts
Third Annual M.L. King, Jr. Day Celebration
January 16, 1994
 - Phillips Academy - Andover, Massachusetts
1994 Martin Luther King, Jr. Day Observance
January 17, 1994
13. Health: What is the present state of your health? List the date of your last physical examination.
- My health is excellent. My last physical examination was in September, 1993.
14. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.
- Vice Chair, Mass. Judicial Nominating Council (1991-1993) (appointed by Governor Weld).
15. Legal Career:
- a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;
2. whether you practiced alone, and if so, the addresses and dates;
3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

Immediately after graduation from law school, from July 1982 to July of 1983, I served as law clerk to Judge Stephen Reinhardt of the United States Court of Appeals for the Ninth Circuit.

After my clerkship, from September of 1983 until September of 1986, I was a staff lawyer with the NAACP Legal Defense and Educational Fund at 99 Hudson Street in New York City.

In 1986, my family and I moved to Boston where I joined Hill & Barlow, a Professional Corporation, located at 100 Oliver Street. I was elected a partner in 1990.

I have never practiced law alone.

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

From 1983 to 1986, while at LDF, I handled death penalty and voting rights matters. I also managed the summer law clerk program and administered the Earl Warren scholarship program for minority law students.

From 1986 to the present, my practice at Hill & Barlow has mainly involved civil litigation in construction,

securities, employment, products liability, banking, and civil rights and other public interest cases. I have occasionally handled criminal matters as well in the state courts. In addition, I have served on the firm's Hiring and Pro Bono Committees.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

My clients have represented a broad range of experience and background: I have represented rural workers in voting rights cases, heirs in will contests, defendants in criminal matters, borrowers in lending discrimination challenges, sole proprietorships and small companies in various business disputes, and major international corporations in complex construction and securities litigation. I have also served as arbitrator in approximately 90 matters arising out of a settlement by the state Attorney General of unfair lending practices claims against a Massachusetts bank, and have been appointed Master by the state Superior Court to hear evidence and make findings in a partnership dissolution case. I have specialized in civil litigation, mainly in the federal courts.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

While at LDF from 1983 to 1986, I appeared in court frequently. Since 1986, I have appeared less frequently.

2. What percentage of these appearances was in:

- (a) federal courts;
- (b) state courts of record;
- (c) other courts.

Approximately eighty-five (85%) of my court appearances have been in federal courts. The remainder have been in state courts of record.

3. What percentage of your litigation was:

- (a) civil;
- (b) criminal.

Ninety (90%) percent of the litigation I have handled has been civil.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I have tried five cases in courts of record to verdict or judgment. I was lead counsel in all but one.

5. What percentage of these trials was:

- (a) jury (40%);
- (b) non-jury (60%).

Two of the foregoing trials were jury trials. The remaining three were bench trials.

16. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;

- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. Case Name: Project B.A.S.I.C. v. Kemp et al.,
Civil Action No. 89-0248P

Court: District of Rhode Island; First Circuit

Judge: Hon. Raymond J. Pettine, District Judge

Co-Counsel: Paul L. Holtzman, Esq.
Krokidas & Bluestein
One Milk Street
Boston, MA 02109
(617) 482-7211

Stephanie S. Lovell, Esq.
Chief, Legal Division
State Ethics Division
One Ashburton Place
Room 619
Boston, MA 02108
(617) 727-0060

Steven Fischbach, Esq.
Rhode Island Legal Services
77 Dorrance Street
Providence, RI
(401) 421-6993

Opposing Counsel: Stephen J. Reid, Jr., Esq.
Blish & Cavanagh
30 Exchange Terrace
Providence, RI 02903
(401) 831-8900

James S. Portnoy, Esq.
U.S. Department of Justice
Civil Division
10th Street and Constitution
Avenue, N.W.
Washington, DC 20530
(202) 633-1280

John P. Schnitker, Esq.
Assistant Attorney General
U.S. Department of Justice
Civil Division - Federal Programs
Branch
10th Street and Constitution
Avenues, N.W.
Washington, D.C. 20530
(tel. unknown)

Description:

This case was brought initially to prevent the demolition of 240 low income housing units at the Hartford Park housing project in Providence, Rhode Island, which were occupied primarily by African Americans and other racial minorities. The case was started by a Providence attorney who filed suit on behalf of a low income tenant-advocacy organization against the U.S. Department of Housing and Urban Development, the City of Providence and various other public housing authorities and officials. Although the original attorney was unsuccessful in stopping the destruction of the housing units, he did obtain an injunction ordering HUD to build and complete replacement units by a date certain. At that point I joined the case as lead counsel to develop the proof of liability and defend the order to build replacement units within the time specified by the district court. I briefed and argued a successful appeal of the injunction, 907 F.2d 1242 (1st Cir. 1990), and then conducted discovery in the case.

A number of national civil rights and civil liberties groups either worked on this case with me as co-counsel or joined as amici in the First Circuit, including the Lawyers' Committee for Civil Rights Under Law, the American Civil Liberties Union Foundation, the NAACP Special Contribution Fund, National Council of La Raza, the National Low Income Housing Coalition, and the Puerto Rican Legal Defense & Educational Fund. The case was later settled on terms favorable to the advocacy group and the former residents of the project.

* * *

2. Case Name: United States v. Albert Turner, et al.,
Criminal Action No. 85-00014

Court: Southern District of Alabama; Eleventh Circuit

Judge: Hon. Emmett Ripley Cox, District Judge

Co-Counsel: C. Lani Guinier, Esq.¹
University of Pennsylvania School of Law
3400 Chestnut Street
Philadelphia, PA 19104-6204
(215) 898-7032

Dayna Cunningham, Esq. (summer law clerk)
NAACP Legal Defense Fund
99 Hudson Street
New York, NY 10013
(212) 219-1900

Opposing Counsel: Jefferson B. Sessions, III, Esq.
U.S. Attorney
E.T. Rolison, Jr., Esq.
Assistant U.S. Attorney
Post Office Drawer E
Mobile, AL 36601
(205) 441-5845

Description:

This case involved a 29-count indictment alleging conspiracy and mail fraud against three Alabama civil rights activists who assisted elderly and rural African American voters in voting by absentee ballot. Ironically, the three defendants -- who included one of Dr. Martin Luther King Jr.'s top deputies -- had organized the Selma-to-Montgomery Voting Rights March twenty years earlier. In 1985, they stood accused of "stealing" the very votes they had fought for the right to cast. The Legal Defense Fund was called upon to defend one of the activists, Spencer Hogue.

I handled some of the pre-trial motions as well as a mandamus petition to the Court of Appeals. Most of the witnesses were elderly or house-bound black voters living in isolated rural communities who initially were too intimidated to talk to any lawyer. Therefore, I spent a considerable amount of time putting potential witnesses at ease so that I could learn about their experiences. At the trial in Selma, Alabama, which lasted four weeks, I

^{1/} Wherever possible, I have provided current addresses and telephone numbers of co-counsel and opposing counsel.

prepared and examined half the witnesses and handled all trial motions and bench arguments. The jury returned a verdict of not guilty on all counts.

After losing the case the government proceeded with another related prosecution for obstruction of justice against Mr. Hogue (No. 85-00025). This case, in which I was lead counsel, was abandoned by the government after an interlocutory appeal on double jeopardy, which I briefed and argued. United States v. Hogue, 812 F.2d 1568 (11th Cir. 1987).

* * *

3. Case Name: Carl Ray Songer v. Wainwright,
Civil Action No. 85-14-Civ-0c-12

Court: Middle District of Florida; Eleventh Circuit

Judge: Hon. Howell W. Melton, District Judge

Co-Counsel: Prof. Dorean M. Koenig
(address & tel. no. unknown)

Opposing Counsel: Peggy A. Quince, Esq.
Assistant Florida Attorney General
401 Northwest 2nd Ave.
Suite 921N
Miami, FL 33128
(305) 377-5441

Description:

This was a capital habeas corpus matter that originated in Florida. Mr. Songer was indigent, and requested assistance from the Legal Defense Fund when his case was pending in the United States Court of Appeals for the Eleventh Circuit.

I was assigned to handle the case, and determined after some review that Mr. Songer's capital sentence was imposed under a statutory scheme that prevented the sentencer from considering a wide array of mitigating circumstances which the Supreme Court had held the Eighth Amendment required sentencers be allowed to consider.

After conducting further investigation, we learned that the trial judge in Mr. Songer's case had in fact considered only statutory mitigating circumstances --

and not non-statutory mitigating factors -- before imposing a death sentence. In fact, there was almost no testimony by the defendant regarding his upbringing, character, background, likelihood for rehabilitation or other mitigating circumstances. His direct testimony took only two minutes. Armed with this information, and facing an execution date, I brought a successor habeas corpus which was eventually heard by the United States Court of Appeals for the Eleventh Circuit sitting en banc. 769 F.2d 1488 (11th Cir. 1985) (en banc), cert. den'd. 481 U.S. 1041 (1985). That court unanimously held that the trial court's failure to consider non-statutory mitigating evidence constituted a harmful Eighth Amendment violation and vacated Mr. Songer's death sentence.

The question of whether other similarly-situated Florida death-sentenced inmates had also been sentenced to death in violation of the Eighth Amendment was addressed in 1987 by the Supreme Court. In a unanimous opinion written by Justice Scalia, the Court held that the Florida scheme as it had been applied at the time of Mr. Songer's trial, violated the Eighth Amendment as it failed to allow the sentencer to consider non-statutory mitigating circumstances. Hitchcock v. Dugger, 481 U.S. 393 (1987).

After a retrial in Songer, the Florida Supreme Court imposed a life sentence.

* * *

4. Case Name: John Veiga v. John McGee, et al.,
Civil Action No. 88-0648-WF

Court: District of Massachusetts; First Circuit

Judge: Hon. Mark L. Wolf, District Judge

Co-Counsel: Michael D. Ricciuti, Esq.
Hill & Barlow, a Professional Corporation
One International Place
Boston, MA 02110
(617) 439-3555

Hon. Reginald C. Lindsay
United States District Judge
McCormack Post Office and Courthouse
Boston, MA 02109
(617) 223-4829

Marc Goodheart, Esq.
 Office of the President
 Harvard University
 Massachusetts Hall
 Cambridge, MA 02138
 (617) 496-9480

Opposing Counsel: John P. Roache, Esq.
 Hogan & Roache
 66 Long Wharf
 Boston, MA 02110
 (617) 367-0330

Description:

This is a pro bono police misconduct case brought on behalf of a black Boston University medical student. We charged that he was forcefully seized without justification, thrown against a car, handcuffed, taunted with abusive language and confined to a locked jail cell overnight by two white Boston police officers on the grounds that he objected loudly to their questioning of him. No criminal charges were filed. The defendants admitted that the plaintiff's loud responses were provoked by and in response to the officers' questions.

I was lead counsel for plaintiff. From 1988 to 1992 I handled extensive discovery, filed a motion for summary judgment, conducted a 12-day jury trial, and filed post-trial briefs. Since that time I have briefed the case on appeal to the First Circuit, seeking to reverse a defense judgment.

The plaintiff's claims were based on clear precedents (1) that speech alone cannot constitute "disorderliness" under state law, (2) that the Supreme Court has repeatedly held that the First Amendment protects a citizen's right to question the actions of the police, and (3) that the First Amendment protects a significant amount of verbal criticism and challenge directed at the police. These points are the basis of a pending appeal.

* * *

5. Case Name: ACORN, et al. v. Clinton, et al.,
Civil Action No. LRC-84-808

Court: Western District of Arkansas

Judge: Hon. Henry Woods, District Judge

Co-counsel: C. Lani Guinier, Esq.
University of Pennsylvania School of Law
3400 Chestnut Street
Philadelphia, PA 19104-6204
(215) 898-7032

Arkie Byrd, Esq.
Mays & Crutcher
415 Main Street
Little Rock, AK 72201
(501) 372-6303

Opposing Counsel: Tim Humphries, Esq.
Assistant Attorney General
200 Tower Building
4th and Center Streets
Little Rock, AK 72201
(501) 682-2007

Description:

This was a class action voting rights case filed on behalf of eligible but unregistered citizens in Arkansas (most of whom were African American). The defendants included a class of all 75 county clerks in the state and other state officials. All constitutional officers of Arkansas were sued as well because by law they constituted the election commission. This case was consolidated with another case (Civil Action No. HC-84-49) from the Eastern District of Arkansas. These cases challenged on constitutional and statutory grounds (1) the failure of state authorities to make convenient and accessible registration opportunities available to all eligible citizens, including the failure of registrars to exercise their power to deputize volunteers to do off-site voter registration, and (2) the Arkansas practice of "purging" or cancelling without notice the registrations of voters who had not voted for four years.

I was co-counsel for the plaintiff class and conducted virtually all discovery in the case. In 1986, after nearly a year of depositions, I led the negotiation of a settlement of both cases which was approved by the

court. As a consequence of this settlement, the Arkansas legislature passed legislation requiring county clerks to recruit, appoint, and train volunteer deputy registrars and to honor all requests to conduct satellite registration anywhere in their counties. Governor Clinton signed the bill and shortly thereafter LDF and the State entered into a consent decree that created a judicially enforceable obligation on the State to enhance the opportunities of black citizens to register, including deputizing the State Department of Human Services employees so citizens who visit the Department's office could register. The result of this case has been to increase dramatically voter registration and participation among thousands of poor, rural Arkansans.

* * *

6. Case Name: Thomas Ward v. Louisiana, Civil Action
No. 89-5036

Court: Criminal District Court, Orleans Parish;
Eastern District of Louisiana; Fifth Circuit

Judge: Hon. Shirley Wimberly (st. ct.); Hon. George
Arceneaux, Jr., District Judge

Co-Counsel: David A. Hoffman, Esq.
Gregory P. Bialecki, Esq.
Hill & Barlow, a Professional Corporation
One International Place
Boston, MA 02110
(617) 439-3555

Alan H. Katz, Esq.
First National
Bank of Commerce Building
Suite 1800
New Orleans, LA 70112
(504) 561-8989

Opposing Counsel: William Marshall, Esq.
Jack Peebles, Esq.
District Attorney's Office
619 South White Street
New Orleans, LA 70119
(504) 822-2414

Description:

This is a pending capital case against Thomas Lee Ward, who was convicted of first degree murder and sentenced to death, although the killing appears to have been provoked by a family quarrel.

Post-conviction proceedings were filed on behalf of Mr. Ward by Hill & Barlow in 1986, after no law firm in Louisiana could be found to represent him. We thereafter sought a stay of execution, writ of habeas corpus, and an evidentiary hearing into the circumstances of his prosecution and conviction. My co-counsel at Hill & Barlow and I investigated this case and discovered a strong basis for the following claims:

- The jury pool from which Mr. Ward's jury was chosen had been selected in a racially discriminatory manner, so as to decrease the number of black jurors. (Mr. Ward is African American.)
- The prosecution used its peremptory challenges in a racially disproportionate manner, in violation of Batson v. Kentucky, to remove still more black jurors.
- Mr. Ward had received ineffective assistance of counsel in violation of the Sixth Amendment.
- The prosecution had withheld exculpatory evidence, including signed statements from witnesses concerning the quarrel, in violation of Mr. Ward's constitutional rights under Brady v. Maryland.

I was lead counsel in an evidentiary hearing in state court, after which the court denied all post-conviction relief. The Federal District Court in New Orleans denied Mr. Ward's claim one day after his federal habeas corpus petition was filed.

Mr. Ward's case is now pending before the U.S. Court of Appeals for the Fifth Circuit. Just before the Fifth Circuit hearing, the U.S. Supreme Court decided Cage v. Louisiana, in which the Supreme Court struck down as unconstitutional a jury instruction concerning "reasonable doubt" which was virtually identical to the instruction Mr. Ward's jury received. (The instruction defined a reasonable doubt as a "grave" and "substantial" doubt.)

* * *

7. Case Name: Edmonson v. Leesville Concrete Co., Inc.,
500 U.S. ____ , 111 S.Ct. 2077 (1991)

Court: United States Supreme Court

Judge: Full Court

Co-Counsel: Marc Goodheart, Esq.
Office of the President
Harvard University
Massachusetts Hall
Cambridge, MA 02138
(617) 496-9480

Josephine Brown, Esq.
Hill & Barlow, a Professional Corporation
100 Oliver Street
Boston, MA 02110
(617) 439-3555

Eric Schnapper, Esq.
NAACP Legal Defense & Educational Fund,
Inc.
99 Hudson Street
New York, NY 10013
(212) 219-1900

Opposing Counsel: Not applicable

Description:

With my co-counsel at Hill & Barlow, I drafted an amicus brief for the NAACP Legal Defense & Educational Fund in this case, which held for the first time that a private litigant in a civil case may not use peremptory challenges to exclude jurors on account of race. For over a century, court decisions had eliminated race discrimination from the jury selection process although for the most part these were criminal proceedings involving discrimination by prosecutors or other government officials. In civil cases, the courts of appeal had divided on the issue whether race was a permissible basis for exercising a peremptory challenge.

The Court in Edmonson said that discrimination on the basis of race in selecting a jury in a civil proceeding harms the excluded juror no less than discrimination in a criminal trial. The Court reasoned that the act of excluding potential jurors on account of race in civil

cases fell within the scope of the excluded person's equal protection right because the peremptory challenge is used in selecting the jury, which is a quintessential government body, and because the courtroom is a genuine expression of government authority within which there should be no racial exclusion.

* * *

8. Case Name: McCleskey v. Kemp,
481 U.S. 279 (1987)

Court: 11th Circuit en banc; United States Supreme Court

Judge: Full Court

Co-Counsel: John Charles Boger
Professor of Law
CB3380, Van Hecke-Wettach Hall
School of Law
University of North Carolina
Chapel Hill, NC 27599
(919) 962-8516

Anthony Amsterdam
N.Y.U. School of Law
249 Sullivan Street
Suite 401
New York, NY 10012
(212) 998-6632

Robert Stroup
181 Walton Street, N.W.
Atlanta, GA 30303
(404) 522-8500

Timothy K. Ford
McDonald, Hoague & Bayless
1500 Hoge Building
705 2nd Avenue
Seattle, WA 98104
(206) 622-1604

Opposing Counsel: Mary Beth Westmoreland
Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, GA 30334
(404) 656-3349

Description:

This case presented the question of whether Georgia's death penalty procedures were applied in a racially discriminatory manner in violation of the Constitution. Warren McCleskey and three other African American men were charged with the murder of a white police officer that occurred during an attempted robbery of a furniture store. While the State's evidence was inconclusive as to the identity of the triggerman, McCleskey was convicted and sentenced to death.

During federal habeas corpus proceedings, McCleskey presented substantial evidence in support of his claim that racial discrimination continued to play a prominent role in selecting which offenders in Georgia would receive the death penalty. A nationally recognized expert testified, after studying more than 1,000 murder prosecutions in Georgia from 1973 to 1979 and after examining and controlling for hundreds of different factors that might legitimately influence a sentencer, that offenders who were convicted of killing whites were more than four times more likely to be sentenced to death than those convicted of killing blacks.

I participated with other LDF lawyers in preparing the brief and argument in this case at the Court of Appeals and before the Supreme Court. We relied on the Court's prior rulings that the death penalty could not be imposed under sentencing procedures that created a substantial risk that the punishment would be inflicted in an arbitrary and capricious manner.

In a 5-4 vote, the Supreme Court upheld the capital sentence and ruled that racial bias in the capital sentencing process could not be proved by statistical evidence alone. Instead, such defendants must prove intentional discrimination by the prosecutor, jurors or the judge in his or her case.

* * *

9. Case Name: Carlson Corporation/Northeast v. ABB Power Systems Inc.,
Civil Action No. 89-1980-C

Court: District of Massachusetts

Judge: Hon. Andrew A. Caffrey, District Judge

Co-Counsel: Timothy J. Dacey, Esq.
Hill & Barlow, a Professional Corporation
One International Place
Boston, MA 02110
(617) 439-3555

Opposing Counsel: William D. Gardiner, Esq.
Langan, Dempsey & Brodigan
40 Broad Street
Boston, MA 02108
(617) 542-1871

Description:

This was a breach of contract action by a civil engineering design subcontractor against the contractor responsible for the overall design of a high-voltage terminal used to convert direct current purchased from Canada to alternating current for use in New England. I represented the defendant in the case, which had contracted with a consortium of New England utilities to build the converter terminal. Because the contract claim involved detailed design specifications contained in the construction contract, it was a technically complex case to litigate. Hundreds of thousands of pages of technical data were involved. The converter itself generates more power than most nuclear power stations.

My co-counsel and I participated in all phases of discovery. I handled most of the depositions for our side. After extensive discovery, including numerous depositions, we settled the case. As a result of our work in this case, we are currently representing the same client in a much larger lawsuit arising out of the same project.

* * *

10. Case Name: Desiree Lynn Washington v. Michael G. Tyson,
Civil Action No. IP 92 846-C

Court: Southern District of Indiana

Judge: Hon. Larry J. McKinney, District Judge

Co-Counsel: Lisa D. Campolo, Esq.
Hill & Barlow, a Professional Corporation
One International Place
Boston, MA 02110
(617) 439-3555

Hon. Reginald C. Lindsay
United States District Judge
McCormack Post Office and Courthouse
Boston, MA 02109
(617) 223-4829

Thomas A. Withrow, Esq.
B. Keith Shake, Esq.
Henderson, Daily, Withrow & DeVoe
2600 Indiana Square
Indianapolis, IN 46204-2071
(317) 639-4121

Opposing Counsel: Lee B. McTurnan, Esq. (now
withdrawn)
Judy L. Woods, Esq. (now withdrawn)
2070 Market Tower
10 West Market Street
Indianapolis, IN 46204
(317) 464-8181

Prof. Alan M. Dershowitz
1525 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4617

James H. Voyles, Esq.
Ober, Symmes, Cardwell, Voyles
& Zahn
300 Consolidated Building
115 North Pennsylvania Street
Indianapolis, IN 46204
(317) 632-4463

Description:

This is a civil damages case by a rape victim against the man convicted of the rape. Ms. Washington came to me after the criminal trial was concluded for help in thinking through her rights under the civil law. After extensive discussion and background investigation, I agreed to serve as lead counsel in her civil lawsuit. The lawsuit seeks damages in tort based on the facts proven at the time of the criminal trial. With the help of co-counsel, we have filed successful motions limiting the scope of discovery pending resolution of

the criminal matter in final form. A motion for partial summary judgment on liability is pending.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question. Please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

One of my most gratifying professional experiences arose out of the second mortgage/home improvement lending "scam" in the Greater Boston area in 1991. As lead counsel for a number of African American borrowers (most of whom were elderly women) acting for themselves and other similarly situated residents of Roxbury, Dorchester and Mattapan, I made demand upon BayBank for a wide variety of relief to remedy illegal, overbearing sales tactics and other scams that lured vulnerable homeowners into high-interest home improvement loans. Eventually, Massachusetts Attorney General Scott Harshbarger's office joined me and my co-counsel (at the Lawyers' Committee for Civil Rights and the NAACP Legal Defense Fund) in two months of intensive negotiations with BayBank, through which we produced a very favorable settlement -- without filing suit. The settlement agreement provided a prompt system of relief to over 10,000 borrowers statewide (even those whose claims may have been barred by the statute of limitations) as well as \$11 million in new funds for low-income housing and low-interest home improvement loans. The agreement was also unique in that

the sponsoring organizations themselves -- LDF and the Lawyers' Committee -- are parties, with full enforcement powers independent of the borrowers.

As a result of my work in the BayBank case, the state Attorney General nominated me to serve as arbitrator for the individual grievances of USTrust borrowers, whose complaints were to be addressed through provisions of a subsequent settlement agreement. From 1992 through the present, I have arbitrated over ninety grievances, applying guidelines devised as a part of USTrust's agreement with the Attorney General.

My work both at Hill & Barlow and at the Legal Defense Fund has required me to manage a busy caseload and to supervise other lawyers who assist me in completing the work. I have also been involved throughout my career in the hiring and evaluation of other attorneys and law students. Through my volunteer board work, I have been able to involve myself in a variety of ways to encourage young persons to commit themselves to the principles of hard work, commitment to their ideals and faith.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

I have shares in Hill & Barlow's "Target Benefit Retirement Plan," from which I am ineligible to draw without penalty until I am age 70 1/2, at the end of the year 2026. The current market value is approximately \$20,000. The Plan is administered by Fidelity and, if confirmed, I would either leave these funds undisturbed or roll them over into an IRA. Otherwise, I anticipate no deferred receipts or compensation.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

I will seek and follow the advice of the appropriate ethics official at the Department of Justice before participating in any matter that could affect the financial or personal interests of myself or any member of my family.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends,

interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more. (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

A copy of my Financial Disclosure Report, SF278, is attached.

5. Please complete the attached financial net worth statement in detail (add schedules as called for).

Please see statement and schedules attached.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

No.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

For three years, while a full-time staff attorney at LDF, all of my work was for disadvantaged clients. Since joining Hill & Barlow, I have expended an average of approximately 25% of all my legal services time on pro bono work for disadvantaged persons. In 1992, I spent over 40% of my time on such matters. These have consistently been some of my most gratifying professional experiences, as well as much of my most challenging litigation. I have also contributed time to the interests of disadvantaged persons through my service on the boards of the NAACP Legal Defense Fund, Boys & Girls Clubs of Boston and Horizons for Youth, as well as serving as a host parent to disadvantaged students at Milton Academy.


2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

In college in 1976 I accepted an invitation to join a "final club," Harvard's version of a fraternity. I was inactive in the club and, as a graduate, wrote the leadership of the club (during then-pending litigation by women students) urging the club to admit women students. When the leadership decided against this, I resigned. I note that the club has now reversed itself and decided to admit women.

FD-278 (Rev. 1-81)
U.S. Office of Government Ethics

Executive Branch PUBLIC FINANCIAL DISCLOSURE REPORT

Form Approved
OMB No. 3208-001

Reporting Status <input type="checkbox"/> New Appointment <input type="checkbox"/> Reappointment		Calendar Year Covered by Report <input checked="" type="checkbox"/> New Appointment, Nominations, or Reappointment <input type="checkbox"/> Term Extension		Reporting Period (If applicable) Nominated 2/1/94		Reporting Period (If applicable) Nominated 2/1/94		Agency Use Only	
Reporting Individual's Name PATRICK		Last Name		First Name and Middle Initial		Date of Appointment, Reappointment, or Extension (Month, Day, Year)		OGE Use Only	
Position for Which Filing Assistant Attorney General Civil Rights Division		Department or Agency (If Applicable)		Department of Justice		Fee for Late Filing Any individual who is required to file this report and does so more than 30 days after the date the report is required to be filed, or, if an extension is granted, more than 30 days after the last day of the filing extension period shall be subject to a \$200 fee.			
Location of Present Office (or preceding address) 100 Oliver Street, Boston, MA 02110		Telephone No. (Include Area Code) (617) 439-3555		Address (Number, Street, City, State, and ZIP Code) 100 Oliver Street, Boston, MA 02110		Reporting Periods Incumbents: The reporting period is the preceding calendar year except Part I of Schedule C and Part I of Schedule D where you must also include the filing year up to the date you received the appointment. Part II of Schedule D is not applicable.			
Position(s) Held with the Federal Government During the Preceding 18 Months (If Not State or Agency)		None		Do You Intend to Create a Qualified Disqualified Person?		Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>			
Presidential Nomination Subject to Senate Confirmation		Senate Judiciary Committee		Date (Month, Day, Year)		January 31, 1994			
Certification I CERTIFY that the information I have furnished on this form and all attached schedules and exhibits is true and correct to the best of my knowledge and belief.		Signature of Reporting Individual 		Date (Month, Day, Year)		January 31, 1994			
Other Parties (If derived by agency)		Signature of Other Party		Date (Month, Day, Year)		January 31, 1994			
Agency Ethics Officer's Opinion The information furnished by this individual is correct to the best of my knowledge and belief, and complies with applicable laws and regulations.		Signature of Designated Agency Ethics Officer/Presiding Officer Paris D. Spinks		Date (Month, Day, Year)		2/1/94			
Office of Government Ethics Use Only		Signature		Date (Month, Day, Year)		2/1/94			
Comments of Reporting Officers (If additional space is required, use the reverse side of this form)		None		None		None			

(Check box if space is not used on the reverse side.)

Page Number

PATRICK, Deval L.

Part I: Liabilities

Report liabilities over \$10,000 owed to any one creditor at any time during the reporting period by you, your spouse, or dependent child. Check the highest amount owed during the reporting period.

Creditors (Name and Address)		Type of Liability
✓	Example First District Bank, Washington, DC John Jones, 123 4th St., Washington, DC	Mortgage on rental property, Delaware Promissory note
J	State Street Bank, Boston, MA	Promissory Note
J	USttrust Co., Boston, MA	Promissory Note
	Sallie Mae, Denver, CO	Promissory Note (student loan)
	AmEx Centurion Bk., Ft. Lauderdale, FL	Revolving

Part II: Agreements or Arrangements

Report your agreements or arrangements for future employment, as well as absence, continuation of payment by a former employer as a result of a layoff, or other arrangements for future employment. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

Participant	Business and Terms of any Agreements or Arrangements		Particulars	Date
	Particulars to partnership agreement, with respect to lump sum payment of capital account & partnership share calculated on service performed through 1/31/14 (for rollover payment) (Indicate partnership manager, if any named, and rollover instructions, if any)	Particulars to partnership agreement, with respect to lump sum payment of capital account & partnership share calculated on service performed through 1/31/14 (for rollover payment) (Indicate partnership manager, if any named, and rollover instructions, if any)		
	Pursuant to Hill & Barlow by-laws, will receive lump sum payment of capital account and partnership share calculated on service performed and fees collected through date of resignation. (Retirement benefit is independently managed and fully funded and need not be paid out or rolled over.)		Hill & Barlow, P.C., Boston, MA	3/94?

Reporting Individual's Name

PATRICK, Deval L.

SCHEDULE D

Page Number

3

Part I: Positions Held Outside U.S. Government

Report any positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

 None ☐

Examples	Organization (Name and Address)		Type of Organization	Position Held	From (Mo. Yr.)	To (Mo. Yr.)
	Not Name of Bank	Not Name of Bank				
1	Hill & Barlow, P.C., Boston, MA		Law firm	Member/partner	10/86	present
2	Milton Academy, Milton, MA		Independent secondary school	Trustee	7/85	present
3	NAACP Legal Defense & Educll Fund, Inc., NY, NY		Civil Rights law firm	Board member	9/90	present
4	Milton Hospital, Milton, MA		Private hospital	Corporator	10/91	present
5	Boys & Girls Clubs of Boston, Boston, MA		Non-profit education foundation	Overseer	6/92	present
6	Horizons for Youth, Boston, MA		Non-profit education	Board member	6/93	present
7	KGHI, Boston, MA		Non-profit radio & TV station	Overseer	6/93	present
8	Harvard Alumni Association, Cambridge, MA		Non-profit education	Board member	6/93	present
9	Boston Bar Association, Boston, MA		Non-profit profi.	Council member	7/93	present

Part II: Compensation In Excess Of \$5,000 Paid by One Source

Report sources of more than \$5,000 compensation received by you or your firm, partnership, or other business enterprise, or any non-profit organization when you directly provided the services generating a fee or payment of more than \$5,000. You need not report the U.S. Government as a source.

 Incumbent/
 Termination Filer/
 Candidate:

 Not Applicable ☒

 None ☐

Source (Name and Address)		Brief Description of Duties	
Examples	Dea Jones & Smith, Hometown, USA	Legal services	
1	More University (parent of Dea Jones & Smith), Hometown, USA	Legal services in connection with university construction	
2	(see attached)		
3			
4			
5			
6			
7			

**SCHEDULE D -- PART II:
COMPENSATION IN EXCESS OF \$5,000
PAID BY ONE SOURCE**

(Supplement to SF 278 of Deval L. Patrick)

Hill & Barlow, a Professional Corporation Boston, MA	legal services
ABB Power Systems Inc. Boston, MA	legal services in connection with converter terminal construction project
Alliance Funding/Lee Servicing Corp. Montvale, NJ	legal services in connection with various lending matters
Marc Goldberg v. Americana Hotels & Realty Corp., et al. Fort Worth, TX	legal services in connection with securities litigation
Bain & Company, Inc. Boston, MA	legal services in connection with various document and witness supboenas
Gene Brown Motors, Inc. v. Nissan Motor Corporation in USA Newton, MA	legal services in connection with vehicle franchise dispute
Jung/Brannen Associates, Inc. Boston, MA	legal services in connection with various design claims

Massachusetts Minority Business
Round Table, Inc.
Boston, MA

legal services in
connection with
various corporate
matters

E. Peter Mullane, Esq.
Cambridge, MA

legal services in
connection with
FDIC dispute

John Veiga
Boston, MA

legal services in
connection with
criminal matter

SAAK Realty (Sharif Abdal-Khallaq)
Boston, MA

legal services in
connection with a
real estate
developer's title
examination dispute

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			LIABILITIES		
Cash on hand and in banks	10	000.00	Notes payable to banks—secured		
U.S. Government securities—add schedule			Notes payable to banks—unsecured	165	000.00 **
Listed securities—add schedule	20	000.00	Notes payable to relatives		
Unlisted securities—add schedule			Notes payable to others		
Accounts and notes receivable:			Accounts and bills due		
Due from relatives and friends			Unpaid income tax		
Due from others			Other unpaid tax and interest		
Doubtful			Real estate mortgages payable—add schedule	636	000.00
Real estate owned—add schedule	750	000.00	Chattel mortgages and other liens payable		
Real estate mortgages receivable			Other debts—itemize:		
Autos and other personal property	150	000.00	sch. loans outstanding	10	000.00
Cash value—life insurance	18	000.00	home imprvmt loan	23	000.00
Other assets—itemize:			AmEx Cent. Bk.	10	000.00
Shs of Hill & Barlow	31	000.00			
art collection	55	000.00			
Total assets	1034	000.00	Total liabilities	833	000.00
			Net worth	201	000.00
			Total liabilities and net worth	1034	000.00
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, cosigner or guarantor *	100	000.00	Are any assets pledged? (Add schedule.)	NO	
On leases or contracts *			Are you defendant in any suits or legal actions?	NO	
Legal Claims	NO		Have you ever taken bankruptcy?	NO	
Provision for Federal Income Tax	NO				
Other special debt	NO				

*Any and all contingent liabilities are solely as a member of Hill & Barlow, A Professional Corporation.

**Loan held by State Street Bank, Boston, MA.

SCHEDULE A- NON-MARKETABLE SECURITIES

Number Of Shares	Description	In Name of	Are These Registered Pledged or Held by Others?	Value	Source Of Value
750+ shs	H&B Deferred Comp Trust	D.L. Patrick	No	186,000 20,000	

SCHEDULE B- RESIDENCES AND OTHER REAL ESTATE (PARTIALLY OR WHOLLY OWNED)

Address and Type of Property	Title in Name of	% of Ownership	Date Acquired	Cost	Market Value	Monthly Payment	Mortgage Amount	Mortgage Maturity
Residential 75 Hinckley	D.L. & D.B.	100%	1989	560K	750,000	3,500	450,000	2019*
Residential Rd, Milton	Patrick						186,000	
Other								
Other								

* Mortgage is held by ITT Residential Capital Corp. and Harvard University.

The Right Person Is Put Forward for Civil Rights Post

Justice: Clinton's choice for a government point man on race relations elevates an able, experienced African American.

By STEPHEN REINHARDT

A young African American lawyer has been nominated to one of the most important and sensitive positions in the federal government. Race relations is still the overwhelming American dilemma, and the assistant attorney general for civil rights is the point man for all racial issues.

President Clinton, after more than a year in office, has finally found his person for the job. He made a superb choice—Deval Patrick, 37, born and raised in the gloomy ghettos of Chicago, educated and trained in the storied halls of Harvard. Deval was one of my first law clerks, and he was, and is, one of the brightest, most personable and ablest young men I have ever known.

Deval's father was a jazz musician who led the road when Deval was 4. His mother raised her children by love, hope and laser strength. When the dean of Harvard Law School called me and said, "I have a terrific young man for you," it proved to be an understatement.

As a law clerk, Deval demonstrated a strong commitment to fairness and decency as well as a remarkable understanding of the relationship between law and justice.

At the same time, when things went wrong, Deval usually responded in a cool, calm, reasoned, almost reflective manner. At first, I thought that perhaps he lacked fire. But I soon realized that the feeling was all there—it was just that Deval's experience with poverty and prejudice had taught him that emotional responses accomplish little and that a quiet determination to overcome adversity is usually the best route to success. Deval learned, he grew, he earned the admiration of all who came in contact with him.

Deval's talents will serve him and his new bosses, Bill Clinton and Janet Reno, well. He will reason calmly and firmly with those who oppose progress in civil rights. Quietly, but with strength, he will push a sometimes reluctant and often overly cautious Administration toward doing what is right for those who so desperately need the support of government. His warmth and charm are likely to allow him to succeed on occasions where others might fail, even in a town as cynical as our nation's capital.

The civil-rights division and its career lawyers will gain a new vitality when Deval takes charge, and he is confirmed by the Senate. His predecessor was a good and decent man who was deeply committed to civil rights, but who served an Administration that had little or no interest in a cause it found so politically unprofitable. In the past decade and a half, morale has dropped dramatically among Justice Department lawyers who litigate cases

involving voting rights, employment rights, educational opportunities and ending discrimination.

It is not only Deval's innate ability and personal magnetism that will now motivate these lawyers, but his leadership style as well. First, he is a doer. He can figure with the best. He will understand the problems not only of those whose rights the Justice Department seeks to protect, but of the lawyers who spend their lives

'He will push a sometimes reluctant and often overly cautious Administration toward doing what is right for those who so desperately need the support of government.'

trying to vindicate the public interest.

Deval is also a listener. He listens and he comprehends quickly. He is organized and efficient—a quality much sought after in the Justice Department these days. He will bring to the division the experience of a successful private law firm and a productive partner in a large and mighty

Finally, and perhaps most important, Deval Patrick represents the revival of an important tradition in this post-Brown vs. Board of Education era. Brown was the

case, in the early 1960s, in which the Supreme Court discarded the reprehensible separate-but-equal doctrine and effectively ended official segregation throughout the nation. After Brown, black and whites could no longer be treated differently under the law. The fabric of American society was never again to be the same. The principal architect of this judicial revolution was Thurgood Marshall, then the lawyer for the National Association for the Advancement of Colored People, later a justice of the U.S. Supreme Court.

As Justice Marshall did, Deval has tried civil-rights cases throughout the nation. Deval did so as a lawyer for the NAACP (by then the Legal Defense Fund), as did Marshall. Deval cares deeply about the victims of oppression, prejudice and discrimination, as did Marshall, the first African American Supreme Court justice. Now Deval is once again following the trail blazed by Marshall, by joining the Justice Department to try to make the phrase "equal justice under law" a reality.

For too long the spirit of Thurgood Marshall has been absent from the executive branch and the Supreme Court. With Deval Patrick's appointment, and that of Drew S. Days III as solicitor general, President Clinton has remedied the first half of that problem. Perhaps Deval will remedy the other half as well.

Stephen Reinhardt is a judge of the U.S. Court of Appeals for the Ninth Circuit.

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&
BARLOW

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TELEPHONE (617) 438-3555 FACSIMILE (617) 438-3560

March 2, 1994

Hon. Joseph R. Biden, Jr., Chairman
Senate Judiciary Committee
Senate Dirksen Office Building
Suite SD 224
Washington, D.C. 20510-6275

Re: Deval L. Patrick

Dear Senator Biden:

On behalf of the lawyers and staff at Hill & Barlow and personally, I am pleased to write this letter in support of the confirmation of our partner, Deval L. Patrick, to the position of Assistant United States Attorney General for Civil Rights.

By way of introduction, I am former President of both the Massachusetts Bar Association and the New England Bar Association, and currently serve as Massachusetts State Delegate to the American Bar Association (ABA) House of Delegates. I also currently serve as the First Circuit representative on the ABA Standing Committee on Federal Judiciary. I have spent my entire 21-year career as a trial lawyer with Hill & Barlow, the past 14 years as a partner. I have known Mr. Patrick since 1986 in a variety of professional contexts, and I have had ample opportunity to observe his many outstanding abilities and qualities at Hill & Barlow and in the Massachusetts legal community generally.

During his eight years as an associate and partner at Hill & Barlow, Mr. Patrick has distinguished himself as a lawyer of outstanding skills, excellent temperament, high integrity and strong work ethic. He has worked on a variety of litigation cases and has been lead trial counsel on numerous complex and important matters, representing both plaintiffs and defendants. In addition, he has served on important Hill & Barlow committees and his judgment has been sought on matters affecting important law firm policies and decisions. He enjoys the highest respect of the partners and associates with whom he has worked at Hill & Barlow. While his departure is a loss to all of us here at the firm, we take pride in the knowledge that his strong professional skills and personal qualities will be devoted to one of the most important positions in the Department of Justice.

Outside Hill & Barlow, in the Boston legal community and the greater Boston community in general, Mr. Patrick has been an exemplary citizen. He is a good husband and father with strong family values. He has served as a director on numerous boards, including the Boston Bar Association Council, the Massachusetts Bar Association Individual Rights and Responsibilities Section, the Boys & Girls Clubs of Boston, the Milton (Massachusetts) Hospital, the Milton Academy, Harvard University's Advisory Committee on Shareholder Responsibilities, and as Chairman of the Mellon Public

Interest Law Scholarship Selection Committee. In 1991, Republican Governor William F. Weld appointed Mr. Patrick as Vice-Chair of the Massachusetts Judicial Nominating Council (JNC) a 22-member merit-selection board which advises the Governor on state judicial appointments. As a fellow member of the JNC for two years with Mr. Patrick, I observed first-hand the depth and quality of his fairness and good judgment in judicial appointments that are so important to the quality of life of all Massachusetts citizens.

Your Committee will hear from others about Mr. Patrick's many qualities, such as his high intelligence, his ability to analyze complex issues quickly but carefully, his strong administrative skills, his strong work ethic, his ability to listen, his ability to forge consensus among individuals who hold strongly opposing views, his excellent temperament, his deep and abiding concern for the disadvantaged in our country, and his very strong leadership skills. I can personally attest to each of these qualities.

Of all his many strengths, the one I wish to focus on for the benefit of members of the Senate Judiciary Committee is Mr. Patrick's excellent judgment. Good judgment is critical to the position for which Mr. Patrick has been nominated. We at Hill & Barlow and in Massachusetts have great respect for his sound judgment, his sense of fairness to all, his ability to consider carefully all sides of a matter, and his ability to lead his colleagues to do what is right in light of all the circumstances.

For all the foregoing reasons, I am certain that Mr. Patrick will be an outstanding Assistant Attorney General for Civil Rights. He is the right person at the right time for this extremely important position in our national government.

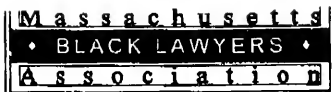
I would appreciate your sharing these comments with the other members of the Senate Judiciary Committee. Thank you for considering my views, and those of my colleagues at Hill & Barlow, on this important appointment.

Sincerely,



Michael S. Greco

MSG:goc



P.O. Box 2411
Boston, Massachusetts 02109-2411

March 9, 1994

Honorable Joseph R. Biden
Chairman, Committee on the Judiciary
United States Senate
221 Russell Building
Washington, D.C. 201510

RE: Deval Patrick

Dear Senator Biden:

This letter is written on behalf of the Massachusetts Black Lawyers Association (MBLA) to express our enthusiastic endorsement of Mr. Deval Patrick's nomination for Assistant Attorney General in charge of the Civil Rights Division of the United States Justice Department.

Mr. Patrick has been, and continues to be, a member in good standing in our organization. His record of accomplishment since emerging from his very humble beginnings from the southside of Chicago where he was raised by a single parent along with his sister is nothing short of exemplary.

Mr. Patrick received a significant portion of his elementary education in Massachusetts when at a young age he applied for and received a scholarship to attend the Milton Academy. Upon graduating from Milton Academy, he received an academic scholarship to attend Harvard College where he graduated with honors. Thereafter, he entered Harvard Law School where he continued to blaze a trail in excellence and achievement.

Among his many accomplishment, he won the law school's moot court competition and was later elected President of the Legal Aid Society. Following graduation he served as a law clerk to the Honorable Stephen Reinhardt of the 9th Circuit Court of Appeals.

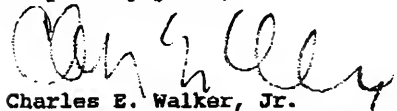
Mr. Patrick continued to hone his commitment and skills in advocating for the dispossessed and disenfranchised while working as an assistant legal counsel for the National Association For The Advancement of Colored People Legal Defense and Education Fund (NAACP/LDEF). While working at the LDEF, Mr. Patrick litigated some of this nation's most important matters in the area of voting rights.

After leaving New York, he returned to Massachusetts to join one of the Boston's premier law firms, Hill and Barlow, where he became the second African-American lawyer to attain the rank of partner in the history of the law firm.

Against the backdrop of his early privileges, Mr. Patrick exemplifies the spirit of the scripture, "...to whom much is given much is required, and to whom men commit much they will demand the more." Luke 12:48. It is with this charge that we are confident that Mr. Patrick will accept the challenge that the position demands.

It is without any hesitation or reservation that we give our highest endorsement of Mr. Patrick's appointment to the Civil Rights Justice Department post. Thank you for your anticipated consideration of this most sincere recommendation. I remain

Very truly yours,



Charles E. Walker, Jr.
President,
Massachusetts Black Lawyers Association



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 14, 1994

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am pleased to provide you with Deval Patrick's responses to Senator Pressler's written questions propounded after his confirmation hearing for Assistant Attorney General for Civil Rights.

If I can be of additional assistance on this or any other matter, please let me know. Many thanks for your continued cooperation and assistance.

Sincerely,

A handwritten signature in cursive script, reading "Sheila Anthony", is positioned above the typed name.

Sheila F. Anthony
Assistant Attorney General

Responses of Deval Patrick to Questions of Senator Larry Pressler
in Connection With Nomination to Assistant Attorney General,
Civil Rights Division

1. What is your impression of the impact this policy statement will have on banks who have a facially neutral policy and practice of not making secured loans if the collateral is subject to the legal system of a Native American tribe which does not provide for perfection of the banks' interest substantially similar to the Uniform Commercial Code?

While I am reluctant until confirmed to address the recent policy statement regarding lender discrimination announced by the Department of Justice and various other federal agencies , recently, it is clear that a disparate impact theory is a valid method of proof of lending discrimination under the Fair Housing Act in the view of virtually every court to have considered the question. The impact of that theory may appear severe in the hypothetical situation outlined in your question, but it may not necessarily be so. I believe that the most appropriate approach to problems in this particular context is to remain flexible, appropriately balancing the business interests of the banks without losing focus of the requirements of the law. My approach would be to take these cases on a case-by-case basis, determining on the strength of the facts and circumstances presented whether some change in lending practices is both possible and prudent. In general, I fully appreciate the position banks in South Dakota may find themselves in terms of their lending practices with respect to Native Americans who reside on reservations.

2. Can you provide assurances to banks in South Dakota that, if you are confirmed, the Civil Rights Division will work with the other relevant federal regulatory agencies to ensure that the maximum flexibility be given to banks to privately overcome these obstacles?

If I am confirmed, I can provide assurances to you and to banks in South Dakota that the Civil Rights Division will bring flexibility and creativity to its law enforcement

responsibilities, and to our coordination role with other relevant federal regulatory agencies.

3. Where an alternative policy and practice with less discriminatory effect exists, but the costs or risks to a bank arguably outweigh the benefits, would a bank nonetheless be required to employ the alternative policy and practice?

This is a difficult question to answer categorically. I believe each case must be taken on its own merits, and that the costs or risks to a bank must be weighed against the benefits of an alternative policy or practice on a case-by-case basis. Practical considerations must be a part of the scrutiny of every problem and every remedy.

4. Can you contemplate an instance where a bank, with facially neutral policies and practices, would be required to make secured loans or mortgages to individuals residing on a reservation even though the bank would incur additional costs and risks in so doing? Please explain.

If so, would the bank be justified in charging appropriately higher interest rates and/or additional fees than it would otherwise to account for the added cost and risk?

I do not think it would be appropriate to address this situation in a hypothetical. Generally I believe it would be appropriate to consider the additional costs and risks to a bank of an alternative policy or practice in light of the history, motivations, good faith, etc. of the bank in creating or maintaining its original policy or practice. Valid business judgments which a bank must bear in mind in devising its policies and practices are necessary considerations. Indeed, neither the Fair Housing Act nor the Equal Credit Opportunity Act requires that sound business judgments be ignored or overlooked. However, these matters, like all others, must be taken on a case-by-case basis.

NOMINATION OF JAMIE S. GORELICK, TO BE DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

WEDNESDAY, MARCH 16, 1994

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 11:04 a.m., in Room SD-226, Dirksen Senate Office Building, Hon. Joseph R. Biden, Jr., chairman of the committee, presiding.

Also present: Senators Metzenbaum, Simon, Kohl, Feinstein, Moseley-Braun, Hatch, Thurmond, Grassley, Specter, and Cohen.

OPENING STATEMENT OF CHAIRMAN BIDEN

The CHAIRMAN. Welcome. Today we convene the Senate Judiciary Committee to consider the nomination of Jamie S. Gorelick to become Deputy Attorney General.

The Deputy serves as a chief operating officer for the Department of Justice. She plays an important role in all policy development, and her supervisory responsibilities encompass the entire Department.

Of paramount concern to me, the Deputy Attorney General supervises all criminal justice functions. In this capacity, she is responsible for the formulation and implementation of the Department's policies and views on all aspects of our national fight against the problems of crime and drugs.

The Congress is on the verge of enacting a strong, tough, and I hope, balanced crime bill to help give our communities the tools and resources they need to battle violent crime occurring now and to begin preventing such crime in the future.

That the Justice Department is an integral part in the formulation and implementation of appropriate crime-fighting strategies almost goes without saying. But without top-flight leadership, organization, and management, the Department cannot effectively fulfill its role.

For this reason, we must move, I believe, expeditiously to confirm a new Deputy Attorney General.

I know the nominee well. Indeed, I have sought her legal counsel in the past.

In my view, Jamie Gorelick possesses keen legal skills, an ability to command respect, and a significant level of management experience—all of which position her to serve as an outstanding Deputy Attorney General.

Her academic credentials are beyond reproach, other than the fact that Senator Sarbanes, a Princeton man, is here and she went to Harvard in graduate school. I do not know how that is going to work. But Ms. Gorelick graduated magna cum laude from Radcliffe College in 1972 and earned her law degree cum laude from Harvard in 1975. She then joined the Washington law firm of Miller, Cassidy, Larroca & Lewin, where she was an associate and later a partner. She served briefly in 1979 as an assistant to the Secretary of Energy.

Ms. Gorelick enjoys a wealth of litigation experience and the respect of her colleagues at the bar, in her firm, and with the bench. She served as president of the District of Columbia Bar Association from 1992 until 1993. This committee called on her at that time for her advice and counsel.

She left private practice last year to devote herself to public service, working as general counsel to the Department of Defense. There she was the Pentagon's chief legal officer, presiding over a legal staff second in size only to the Justice Department. In addition, she supervised the Judge Advocate General Corps of Prosecutors, also second in size only to the Justice Department.

I am pleased to welcome Ms. Gorelick to this Judiciary Committee hearing and look forward to discussing her views on how to best manage the Justice Department and respond to a host of pressing legal and policy issues facing the administration and the Congress.

I am especially interested in her views about the continuing effort to fight crime—to ensure strong and effective Federal law enforcement, to help States and localities fight violent crime, and to encourage and assist our families and communities who are on the front line of our effort to fight and prevent crime.

In working toward each of these goals, we must also work to restore public confidence in our criminal justice system so that our system fulfills the promise of vigorous, just, and fair enforcement of the law.

Ms. Gorelick, I welcome you to the committee, and I also welcome three of our distinguished colleagues: the senior Senator from the State of Maryland, Senator Sarbanes; and the other Senator from Maryland, the distinguished Senator—and I am not sure whether she is going to be majority leader or not, but I will be particularly respectful to her today—Senator Mikulski. And I want to know, by the way, Barbara, I am going to ask you to be under oath. When we went to that function not long ago, you kiddingly said to everybody, "And I am going to be majority leader," with the majority leader standing there. Did you know something we did not know? You can decide to comment on that if you want later.

Senator MIKULSKI. Am I subpoenaed here? [Laughter.]

The CHAIRMAN. Welcome. It is great to have you here.

And a woman on the House side with whom I have had the pleasure to work on a number of issues I referenced, Congresswoman Connie Morella. Connie, welcome. It is great to have you here.

Now, with that, why don't I yield now for an opening statement from my distinguished colleague, the ranking member, and then we

will ask you, Senator Sarbanes, and then you, Senator Mikulski and Congresswoman Morella, to make your introductions.

OPENING STATEMENT OF SENATOR HATCH

Senator HATCH. Well, thank you, Mr. Chairman.

I welcome you to the committee, Ms. Gorelick. I certainly welcome our colleagues from both the Senate and the House, Senator Sarbanes, Senator Mikulski, and Congresswoman Morella. I have respect for all three of you, as you know, and what you say here is very important to this committee.

I want to commend the President for your selection to be Deputy Attorney General of the United States. I have known Ms. Gorelick for a number of months now. We first became acquainted, at least to my recollection, when you voluntarily helped the administration in counseling with some of its nominees as they came before this committee in some very, very difficult circumstances, and I got to see your abilities at that time. I have tremendous respect for your ethics and for your integrity and, I might add, for your ability as a counsel and as an attorney. I think you will add a great deal to the Justice Department. So I personally have a tremendous respect for you.

Having said that, now, I want to talk a little bit about what you are going to have to do when you get down there, because I am very disappointed in what is happening in the administration with regard to criminal law enforcement. And I hope that you will be able to assist in addressing the growing concerns about the Department of Justice's ability to carry out its mandate, especially in the criminal justice area.

I am concerned as well by the gap between this administration's rhetoric and its actions in criminal law enforcement. These multiple concerns have been heightened not only by delays in nominating persons to positions at the Department, but also by the turnover of the Justice Department's leadership.

We are now more than a year into the Clinton administration, and I believe a clear and disturbing trend has developed wherein the President talks tough on crime, but his policies and his actions are failing to deliver. Reversing Teddy Roosevelt's old maxim, when it comes to crime, this administration talks loudly, but it carries a small stick. I think you can help change that.

President Clinton's proposed fiscal year 1995 budget cuts Federal prison construction by nearly 30 percent; that is a \$78 million reduction. It cuts Federal law enforcement personnel and cuts existing grants to State law enforcement.

The President's budget lets the American people down, in my opinion, by slashing Federal law enforcement efforts. The President cuts 1,523 Department of Justice law enforcement agency positions. According to the Justice Department budget summary, the Federal Bureau of Investigation loses 847 positions, the Drug Enforcement Agency loses 355, the Department's Criminal Division loses 28, the Organized Crime Drug Enforcement Task Forces lose 150, and Federal prosecutors lose 143 positions. This is at a time when we are fighting hard to try and resolve these crime problems in America. And even without the 1995 budget cuts, there are already 431

fewer FBI agents and 301 fewer DEA agents today than there were in 1992.

Now, at a time when violent crime and drug control are said to be national priorities, these cuts will reduce the effectiveness of Federal law enforcement, and the President's budget acknowledges this. The administration's own budget figures reveal that Federal prosecutors will be filing 527 fewer criminal cases in fiscal year 1995. The Organized Crime Drug Enforcement Task Force Program, cut by over \$12 million, will investigate, indict, and convict fewer criminals. Indeed, former Deputy Attorney General Philip Heymann confirmed this in a recent article when he wrote, "With fewer Federal investigators and fewer Federal prosecutors in the years ahead, there will not be more Federal law enforcement but less." That is from the Washington Post in February of this year, and that is the reality behind the administration's rhetoric.

These reductions will only add to the already lagging Federal anticrime effort in the administration. The Administrative Office of the U.S. Courts recently reported that in 1993 the number of criminal cases filed by Federal prosecutors decreased by over 3 percent. This was the first decrease in 10 years. Now, I do not blame the administration necessarily for that, but it is important to recognize that this is happening at a time when crime is now the No. 1 issue in America, and rightly so.

The Administrative Office attributes this overall decrease in criminal filings to the Clinton Justice Department's significant reduction in drug prosecutions. Drug prosecutions in 1993 decreased by 7 percent, or 902 cases.

There is clearly a need for fiscal restraint, and I think we would all acknowledge that. But in a budget of \$1.5 trillion, priorities can and must be set.

Cutting Federal criminal law enforcement positions, prison construction, and existing law enforcement grants programs, at least in my opinion, is an unwise choice, especially in light of our Nation's crime problem. So I am hoping that your influential voice will reverse this trend and that you will counsel with the White House on how important this is in the total anticrime battle. Because what is happening here is inconsistent with what the President said he is going to do. And I think he wants to do it, but OMB is making these cuts in areas that really should not be made.

Existing State and local law enforcement grants, which police have been counting on, are also cut by over \$400 million in order to fund the crime bill's proposed police hiring program. The Byrne formula grants program, which has helped to establish or expand over 950 task forces and drug units, is terminated. The money to pay for the police hiring program was supposed to come from savings earned through personnel cuts, not from existing law enforcement grants.

This is just the tip of the iceberg of the retreat from tough and wise Federal law enforcement. The Clinton Justice Department apparently opposes the extension of the Federal death penalty for major drug dealers where death does not directly result from their illicit activity. They have taken this position despite a very strong case for the provision's constitutionality. This provision is in the Senate crime bill, added by Senator D'Amato, myself, and others.

I hope you will, if confirmed, help swing the administration into a public position of support for this provision.

Now, the President made a big splash in his State of the Union address with his support of a three strikes, you're out proposal. But when it came to the fine print of actually submitting a proposal to Congress, the administration offered a weak provision, softer than the Senate crime bill, which will not do much in that area anyway. And, in effect, the administration's proposal narrows the strike zone for violent offenders and drug dealers, allowing many of these criminals to really draw a walk when they otherwise ought to remain behind bars.

To my dismay, the Attorney General last year rescinded the policy of her predecessor that required Federal prosecutors to charge the most serious, readily provable offense or offenses consistent with the defendant's conduct. The Department's new policy now permits prosecutors to make independent decisions about whether a prescribed guideline sentence or mandatory minimum charge is not proportional to the seriousness of the defendant's conduct. In other words, this new policy increases the potential for the unwarranted softening of punishment for violent offenders at a time when we up here, certainly Senator Biden and I, and others are trying to do everything we can to get tougher on violent offenders. I think one might question the worthiness of even the President's three-time loser law for career offenders if Clinton prosecutors are encouraged to ignore it whenever they believe that the punishment is unfair.

Furthermore, this is an administration which talks about the exploitation of children but chose to reverse the position taken by the prior administration in siding with a convicted child pornographer when he appealed his case to the Supreme Court.

If you are confirmed—and I believe you will be, and I am going to do everything I can to see that you are—I think you will bring a great dimension to that Department. I am going to work with you, as I know the distinguished chairman of this committee will do, in continuing the fight against crime and drugs. And through a sustained effort on the part of both the administration and the Congress, I believe we can make up this ground that I am announcing we lost over the past year and make progress in fighting drug abuse and violent crime throughout the country.

I take the President at his word. I think he is sincere. I think he wants to do something against crime. And I know that OMB wants to do something about the deficit. But we have got to somehow balance these things so that the President's wishes to do something about crime coinciding with ours, and I am sure yours, will become a reality. So I am just, I guess, urging you, as you get into this position, to help us to do more in this area and to be the leader that we really need in this area. I have confidence that you will be.

Thank you, Mr. Chairman.

Ms. GORELICK. Thank you, Senator.

The CHAIRMAN. Senator Sarbanes?

Senator SARBANES. Mr. Chairman, Senator Mikulski is chairing a hearing, and I will yield to her so she can get on to the hearing.

The CHAIRMAN. Senator Mikulski.

**STATEMENT OF HON. BARBARA MIKULSKI, A U.S. SENATOR
FROM THE STATE OF MARYLAND**

Senator MIKULSKI. I thank my senior Senator for his courtesy. We are involved in some appropriations hearings.

Both of my colleagues will speak to Ms. Gorelick's legal and managerial competency. I would like to just say to the committee I enthusiastically support the nomination of Jamie Gorelick for this position. Others will speak to her legal scholarship, the competency, the managerial aspects that she so clearly demonstrated over at Department of Defense. But I think we also have to look at what people do with their own time, which gives us an indication of their values, their principles, and what is their inner core.

I would like to bring to the committee's attention that, yes, Ms. Gorelick has been active in the Women's Bar Association as well as the District of Columbia Bar. But where she has also made a significant impact is that she has been on the Advisory Board to the Home Court of the Washington Legal Clinic for the Homeless. From 1989 to 1991 on a pro bono basis, she worked with other lawyers who were working with the homeless to make sure that they not only had shelter, but had an opportunity and knew that they had a lawyer on their side.

In 1993, she was a member of the Board of Directors of not only the National Women's Law Center, who had a whole framework and agenda related to violence in our society, but she was on the Bazelon Center for Mental Health Law. Many of us know for those who are mentally or emotionally disturbed or handicapped, they certainly cannot speak for themselves and often do not have the families to speak for them. And Ms. Gorelick, on the board of directors, saw how, under a rule of law and a framework of law, those people could have a voice and a protection.

I think those are the kinds of values she has clearly demonstrated as a lawyer, a resident, of course, of her home State in Chevy Chase, and I would really hope that the committee would look beyond headlines and the politics, the political environment in which we find ourselves, and have a Deputy Attorney General who brings to us scholarship, legal competency, administrative ability, but the kind of core values that the legal community does represent in the United States of America.

The CHAIRMAN. Thank you very much, Senator, and thank you, as usual, for pointing out an aspect of the character of the nominee that I think is worth noting and might have gone unmentioned. Thank you very much. I appreciate your coming.

Senator Sarbanes.

**STATEMENT OF HON. PAUL S. SARBANES, A U.S. SENATOR
FROM THE STATE OF MARYLAND**

Senator SARBANES. Mr. Chairman and members of the committee, thank you very much. I am very pleased to appear before the committee this morning in support of Jamie Gorelick, who has been nominated by the President to be the Deputy Attorney General of the Department of Justice.

A resident of Chevy Chase, MD, Jamie Gorelick has had a very distinguished career in the private and public sectors of the legal profession. A magna cum laude graduate of Radcliffe College, a

cum laude graduate of the Harvard Law School, where, incidentally, she was at the same time a teaching fellow in the university's Department of Government, she has practiced law in the District of Columbia since 1975 and has become a skilled litigator with extensive experience in both civil and criminal cases.

Throughout this very active and successful legal career, she has made a significant contribution to the legal community by her service on local and national bar organizations and her pro bono work. She served on many important committees of the District of Columbia Bar Association, was, in fact, the president of the D.C. Bar Association last year. She has been active in a number of ABA organizations, was a member of the ABA House of Delegates. She has published and lectured on a range of legal issues. She was honored last year as the Woman Lawyer of the Year by the Women's Bar Association.

Now, she also has significant experience in the public sector. She is currently the general counsel of the Department of Defense, which I did not fully appreciate is one of the most significant legal positions in the Federal Government. She is responsible as the general counsel of the Department of Defense for over 6,000 lawyers, has to deal, of course, with a wide range of very complex legal issues, really just covering the range of possible activities.

She also in the late 1970's served in the Department of Energy as special assistant to the Secretary of Energy, counselor to the Deputy Secretary, and, in fact, received the Secretary's Outstanding Service Medal for her contributions in those positions.

It is clear from her impressive career that she has dealt with a wide range of legal issues, which, of course, is an important background, I think, to be bringing to this position. But I want to highlight for the committee just one important area of her activities. In her practice, her writings, and her volunteer work, she has focused on legal ethics and conflict-of-interest questions. Her expertise in this area has been sought out by others in the legal profession. She is a recognized expert in this field. She served on the Legal Ethics Committee of the D.C. Bar Association. She helped to develop the model rules of professional conduct for the 60,000 members of the D.C. Bar Association.

In my judgment, Jamie Gorelick is well qualified to assist Attorney General Reno in managing the Department of Justice. She has the legal experience and management experience that are needed for the position of Deputy Attorney General. I think she brings a proven record of accomplishment and leadership. I congratulate her on this nomination. I commend the President for making it, and I urge the committee to move promptly and favorably in bringing her nomination to the full Senate.

Thank you very much.

The CHAIRMAN. Thank you very much, Senator.

STATEMENT OF HON. CONSTANCE A. MORELLA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Ms. MORELLA. Mr. Chairman and distinguished members of the Judiciary Committee, it is a pleasure for me to be over here in the other House for such a great occasion to celebrate, a little pre-

maturely, what I believe is going to be the approval as Deputy Attorney General of my constituent, an extraordinarily qualified woman, Jamie Gorelick.

You have heard a lot about her credentials, and I know you have them before you. But let's just pull them together. This woman is extraordinarily qualified because she has the education—Radcliffe College, Harvard Law School. She obviously has the intelligence and the diligence—*magna cum laude, cum laude*. She has the experience. She has the experience, having spent a great deal of her time as a practicing attorney with a very prominent law firm in the District of Columbia where she was an associate and then she became a partner. She has shown her legal, analytical talent.

She has management skills. She went on to the Department of Defense as general counsel. That is handling the Pentagon's 7,000 lawyers, which is no easy task. She has been responsible for helping to prepare Bobby Ray Inman and Bill Perry. She has worked with Janet Reno. As a matter of fact, Janet Reno has stated she has the marvelous ability to analyze an issue, size it up, and give extraordinary judgment. And this is the woman with whom she will be working.

I want to point out, too, that in addition, prior to that, Ms. Gorelick is a former president of the District of Columbia Bar Association, and I want to point out that that constituency is 60,000 people, 60,000 members.

A colleague of her who was copresident of the National Women's Law Center, Marcia Greenberger, said she is a woman who cares about women and cares about all people and cares about our society.

I believe she has got the management skills, the common sense, the leadership ability, and, above all, she has the character, the dedication, and the temperament to serve us very well as Deputy Attorney General.

As Shakespeare once wrote, probably bearing her in mind, "The force of her own merit makes her way." And, indeed, I hope it will make her way representing us as Deputy Attorney General. So it is a pleasure to commend very highly to this committee my constituent.

The CHAIRMAN. Connie, thank you very much for that strong and ringing endorsement and for informing me—you just solved a partial problem for me. I was a bit confused about Washington. Now I understand. There are 60,000 lawyers in the city of Washington?

Ms. GORELICK. They are not all in the city. [Laughter.]

The CHAIRMAN. Members of the D.C. Bar, 60,000.

Ms. GORELICK. Yes, sir.

The CHAIRMAN. God bless America.

Senator HATCH. I was amazed at that, too.

The CHAIRMAN. Well, on that score, would you stand and be sworn?

Senator HATCH. God save America.

Ms. MORELLA. We probably contribute to the work that they have.

The CHAIRMAN. Ms. Gorelick, do you swear that the testimony you are about to give is the whole truth and nothing but the truth, so help you God?

Ms. GORELICK. I do, sir.

The CHAIRMAN. Welcome.

I say to my colleagues, you are welcome to stay, but I know you have equally pressing business, and thank you for making the effort to be here.

The floor is yours.

**TESTIMONY OF JAMIE S. GORELICK, TO BE DEPUTY
ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE**

Ms. GORELICK. Mr. Chairman, Senator Hatch, and members of the committee, I am very happy to be here today. I think you can tell that from my face. And I want particularly to thank Senators Mikulski and Sarbanes and Congresswoman Morella for their kind and really wonderful introductions of me. We—my husband, my children, and I—are very well represented in the Congress. I think that is quite clear.

I am deeply honored that the President has nominated me for the position of Deputy Attorney General. I have always held the Department of Justice in the highest esteem, admiring its very proud traditions of excellence and professionalism, and revering its historic role as the advocate and the guarantor of the rights of all Americans. I consider service in the Department one of the highest callings that a lawyer can undertake.

I currently serve in another department with very proud traditions and a critical mission, the Department of Defense. During my tenure there, I have developed tremendous respect and admiration for the men and women of our Armed Forces. They embody the highest ideals of public service, commitment, and professionalism to which all Government employees and all citizens should aspire. I will truly miss working with such a dedicated and talented group of people, if I am confirmed as Deputy Attorney General.

The lessons I have learned at the Department of Defense will inform my service as Deputy Attorney General, if I am confirmed in that position. First, working every day with men and women who are prepared to give their lives in service to their country and to each of us makes you acutely aware of a very heavy responsibility: that is, to do everything you can to ensure that those men and women have the resources and the policies they need to perform their jobs effectively and safely.

At the Department of Justice, of course, the fight against crime is the number one job. Violent crime, in particular, is a scourge that is tearing at the very fabric of our society. As we aggressively move to do battle against it, the Justice Department's leadership must be mindful of the commitment and sacrifices made and of the risks taken every day in every State and every city by the men and women in law enforcement who are fighting on our behalf. We must ensure that those we ask to fight on the front lines have the financial and personnel resources as well as the legal and investigative tools that they need.

Since I was nominated, I have met with police and prosecutors from every level—Federal, State, and local governments. I promised them that if I am confirmed, I would do all that I could to help to get them the resources and the tools that they need. If confirmed, I will make good on that promise.

A second lesson I have learned at the Defense Department is the necessity of organization and communication in running a large agency. For the last year, I have had the great privilege to counsel the leadership of the largest organization in the world, and I have overseen the largest group of lawyers—over 6,000, not quite 7,000—anywhere but the Department of Justice. We deal with an extraordinary array of legal issues, providing advice to the Department's military and civilian leadership on some of the most contentious issues of the day, ensuring that the Department's actions conform to the law, and overseeing the system of military justice that governs the Nation's Armed Forces. To perform these tasks effectively requires strong management, clear direction about the Department's goals, and good communication with the many components that make up the Department. The Deputy Attorney General must use similar communication and organization skills to help the Attorney General run the Department of Justice smoothly and effectively.

Finally, I have also learned that independence and professionalism are especially essential qualities in a Government counsel. Obviously, these qualities are necessary for all lawyers and any lawyer who serves as an effective advocate or counselor or an office of the court. But they are indispensable for a lawyer in public service, whose ultimate client is not her agency but the American people. A Government lawyer must ensure that her eyes are trained on what is right and that her actions are based on considered legal judgments, not political calculations. If confirmed as Deputy Attorney General, I pledge to uphold the Justice Department's distinguished tradition of independence and professionalism, a tradition that is vital to maintaining the American people's trust in Government and in our system of laws. Politics must play no role in law enforcement decisions at the Department of Justice.

Today, this Nation faces a host of wrenching problems. Among the most difficult of these are violent crime and the plague of illegal drugs that is decimating cities and towns across America. Although we have made vast strides in civil rights since the 1960's, thanks to the inspired efforts of people such as Thurgood Marshall, Martin Luther King, and Bobby Kennedy, there remains much to do to ensure equal rights under the law for all Americans. The Department of Justice must provide national leadership in attacking these problems. It also must be the voice of the American people in our courts. And, most importantly, it must illuminate with facts and analysis the debates over both criminal and civil justice. If confirmed as Deputy Attorney General, I will devote every ounce of my energy and determination to meeting these challenges.

I want to thank each of the members of this committee and your staffs for working with me in this transition period, in my period of meeting with you and discussing the issues of concern to you, and I particularly would like to thank Chairman Biden and Senator Hatch for their personal courtesy that they have extended to me over the last few weeks.

With that, I thank you, and I welcome and invite your questions and your thoughts as we begin this dialogue.

The CHAIRMAN. Thank you very much. We will go with 10-minute rounds. OK? Is that appropriate?

Senator HATCH. That is fine.

The CHAIRMAN. Let me begin the questioning, if I may, Ms. Gorelick. As I indicated in my opening statement and you did in terms of your statement regarding your role at the Defense Department, will your role as Deputy Attorney General be primarily one of overseeing management of various facets of the Department? What is the primary role, as you see it?

Ms. GORELICK. Well, I have discussed this issue with the Attorney General. The organization chart, if you will, will be the one that currently exists. But I think the reality may be a little different than the one that you have experienced in the last year. The Attorney General very much wants help in managing the Department. She wants a right arm to help her manage the Department.

Clearly, there will be oversight throughout. There will be an intervening level of management on the civil side, but I would expect to have, if confirmed, oversight and essentially chief operating officer functions for the entire Department.

The Chairman. Will that affect policy beyond administrative policy? How will you interact? For example, I guess the best way to ask it is to ask you a policy question. One of the things that the crime bill that passed here had—that I introduced, with the Attorney General's total cooperation in signing off on every period, dotted "i", and line of the so-called original Biden crime bill. The reason it was put in exactly that way was because it had the full support of the Attorney General. Some amendments were added to the crime bill. They basically fell into three categories: ones that improve the crime bill, like the distinguished Senator from California's amendment and the distinguished Senator from Wisconsin's amendment on children and guns, and several others; a second category of amendments which I am basically agnostic on, they are not worth fighting over because they do not mean anything; and the third category I think moves, from pernicious to cumbersome, which I facetiously refer to as the barbed wire amendments.

But when all the characterization subsides, there is left a very fundamental question of federalism and what is the role of the Federal Government. What is the role of Federal law enforcement, Federal prosecutors, and Federal courts in the area of crime, since 95 percent of all the crime is committed within local jurisdictions, is prosecuted by local prosecutors, tried in local courts, and sent, if convicted, to local prisons, if sent to prison?

Now, out of frustration—and it is a frustration I understand—a number of my colleagues have introduced amendments to the crime bill—which ultimately passed. I was in the minority on these amendments. I want to make it clear. My view did not prevail. My notion of federalism did not prevail—amendments passed that federalize an astounding number of crimes, and a large number of crimes in categories that heretofore had been treated as totally and exclusively within local jurisdictions.

For example, Senator D'Amato introduced three amendments, one of which is one of those I am agnostic on, I think arguably the Senator from Utah is right, the so-called drug kingpin amendment. I had introduced the first drug kingpin bill which passed, but he expanded it where the definition of a drug kingpin, you have to be a really heavy-duty drug trafficker with a significant number of

people working for you to qualify. If a death results from the sale of those drugs that you are operating with, even though you cannot prove a death results, you do not have to prove it. If you are a drug kingpin and you are convicted under the statute, D'Amato's amendment says it is a capital crime.

That does not bother me as much as two others that were introduced that I want to ask you about. One was the D'Amato amendment federalizing all gun crimes. Any crime committed in a local jurisdiction with a gun automatically goes to Federal court. That is 600,000 cases. If I am not mistaken, there were a total of 24,000 or 26,000 cases brought by Federal prosecutors in the entirety of the country last year. Now there is a potential additional 600,000 cases at a local level that now are bumped up to the Federal level. And I understand the Senator's frustration. I do not mean this facetiously. With all the trouble he is having and they are having in large cities like New York, I understand his frustration and the State's inability. He wants to bump it up to the Federal level.

Secondly, there was another amendment that he introduced, and there are others, but these are the two that come to mind the quickest. One was essentially federalizing the death penalty. I happen to support the death penalty—in the Biden bill, there are 52 new death penalty provisions. But 13 States have decided that they do not want the death penalty in their State, period. My notion of federalism is that we should not make local crimes in those States susceptible to a capital offense, thereby bringing in a Federal death penalty over the opposition of the people of Wisconsin and 12 other States.

Yet, if there is a murder as a consequence of the use of a gun, the D'Amato amendment, which passed overwhelmingly, would bump that to Federal court and essentially trump the State's position—voted on by State legislators, acted on by Governors—and require the death penalty, or make it available, in those States.

Now, I think these are well-intended, but misguided attempts. I think they should be dealt with on a local level. I know the Department's position. The Attorney General shares my view. What is your position, and how will you interact as this debate moves to the House on this principle of federalism? Are you any part of that? Will you sit with the Attorney General? And if you will, I would like to know your view of the appropriate roles and divisions under our Constitution of Federal and State jurisdiction on these kinds of matters?

Senator COHEN. Mr. Chairman, could that be classified as a leading question?

The CHAIRMAN. Well, by the way, it is a leading question because I know where the Attorney General is. I do not know where you are on this, and if you are going to be making policy, it is important to me to know what your view on federalism is, because some in the Department are not as supportive of the position taken by the Attorney General and me. And if you do not play any role in that, you do not have to answer it because it will not matter.

Ms. GORELICK. Senator, you know me well enough to know that if I am in a position such as that of Deputy Attorney General that I will be a partner in discussing the policy positions of the Department. You also know me well enough to know that I will be there

for the debates and for the discussions of policy. And I will be a partner with you, if you will let me, in working through the difficult issues that you have—

The CHAIRMAN. Because your predecessor, I might add, who is freely speaking now, was not anywhere to be seen during these debates. I see him on television all the time lecturing everybody about what the Department did and did not do. And I love him. I was one of the original supporters of him in 1978, but he was not on the floor with Joe Biden. He was not out in the hallway collaring people. To the best of my knowledge, he was—I do not know. Maybe he was preparing a treatise somewhere. But the way it sounds now is that he was actively involved and these are stupid amendments. I never heard from him. Never heard a word. It was in the ether. If you listen to him on television, you would think that he was sitting with me in the back bench of the Senate when 10 or 11 other Senators and I were the only people voting against these amendments.

My rhetorical question is: Where was he? And where will you be?

Ms. GORELICK. Well, I cannot answer the first question, but I will answer the second, which is that I will be here.

The CHAIRMAN. Will you be on the floor? If you are involved in this policy debate, are you willing to be over on the floor, over there lobbying Congresspersons? Because on every other important thing to the last administration and to this administration, they are on the floor. When NAFTA was there, every Cabinet member was around. There was not a second-in-command in any Cabinet that was not out there in the hallway saying this is important.

I think this is real important. Will you be over in the House and back here in the Senate when it comes?

Ms. GORELICK. Yes, sir, if you confirm me.

The CHAIRMAN. I will confirm you. All right. That is all I needed. [Laughter.]

That is the end of my leading questions. I yield to the Senator from—oh, excuse me. If you do not mind, Senator, he would like 30 seconds because he is conducting a budget hearing.

OPENING STATEMENT OF SENATOR SIMON

Senator SIMON. We are marking up the budget. So far we have not eliminated the salary for Deputy Attorney General.

Ms. GORELICK. Thank you, sir. Although I would volunteer, I must tell you.

Senator SIMON. I simply want to say I think the President has made an excellent nomination. I have been very favorably impressed by the nominee. I do think what Senator Biden has just mentioned is extremely important. The Justice Department cannot be bystanders in this game. You have to be participants. And I think you are going to be a participant, and I will be very pleased to vote for you.

Thank you, Mr. Chairman.

Ms. GORELICK. Thank you.

Senator SIMON. Thank you, Senator Hatch.

The CHAIRMAN. Professors are allowed to be bystanders. You cannot be. And I will just remind you that you did not answer my question on what your view on federalism is. I am also reminded

that I have committed a serious breach of etiquette here. Do you have any family here?

Ms. GORELICK. I do, sir.

The CHAIRMAN. We would very much like to meet your family, if you do not mind.

Ms. GORELICK. All right. That would give me great pleasure. My husband, Richard Waldhorn, is sitting right here, if you would wave.

The CHAIRMAN. Welcome, Richard.

Ms. GORELICK. He is taking this with a wonderful sense of humor, I must say. My niece, Alyssa Gorelick, and my brother, Steven Gorelick, who are constituents of Senator Feinstein and have come all the way here from California last night to have this wonderful civics lesson for my niece. And my sister-in-law, Jane Stine, is right behind them.

The CHAIRMAN. Welcome.

Ms. GORELICK. Thank you very much for that opportunity, Senator. I appreciate it.

The CHAIRMAN. Before I yield, your view on federalism?

Ms. GORELICK. Senator Cohen, if you put him up to this, this is really unfair to make me answer a substantive question.

My views, Senator, on this are quite similar to yours. Let me say that I think that the principal role of the Federal Government with regard to crime, which is, I think, our No. 1 problem today, is leadership. We cannot do it all ourselves. We must work very closely with State and local government to give them the tools and the resources they need and the policies they need and the laws that they need.

That does not mean that we should take over all of State and local law enforcement. No law enforcement official in the State and local arena—and I have met with them, and I have counseled with them, and I will be very available to having a dialog with them, and I believe we will have a strong working relationship. None of them believes that the solution is federalizing State crimes. What we need to do is look at when there is a particular Federal role, a contribution that can be made by the Federal Government, either with a particular penalty or with a particular kind of investigative tool, and where we can help in that way, in a selective way, that is how we can be, in my view, most effective.

I do not think that we need to have—my own personal view is that I do not think we need to have a debate over every single crime that is committed as to whose jurisdiction it falls in. And I think we must use the resources we have most effectively. That is my inclination. Clearly, where different provisions fall is a subject of debate, and I know it is within this committee.

The CHAIRMAN. One last thing. I should point out that in my characterization of Senator D'Amato's amendment, he calls for concurrent jurisdiction. It is not required that the Federal Government take that jurisdiction. It is concurrent jurisdiction on his gun amendment.

Ms. GORELICK. I did understand that, sir.

The CHAIRMAN. I yield to the Senator from Utah. Thank you for your indulgence.

Senator HATCH. Thank you, Mr. Chairman.

I enjoyed your remarks there. As Senator Biden has suggested, this Republican proposal—and I have some concerns about it, too—to get Federal courts concurrent—

The CHAIRMAN. But all the Democrats voted for it, too, unfortunately.

Senator HATCH. Yes, that is right. Senator Biden has suggested that concurrent jurisdiction over firearms offenses, like we currently have over drug offenses—it is very similar—would automatically bring about 600,000 new Federal criminal cases. Well, now the Judicial Conference has recently stated that in reality this provision would probably bring about 2,500 cases to the Federal system. So that has to be taken into consideration.

Frankly, like I say, I do not want to federalize all criminal matters either. We have to make sure that we delineate in a very careful manner so that we use our system in the best possible way.

Let me just say this: Your predecessor, former Deputy Attorney General Phil Heymann, who I also have a lot of respect for, was responsible for overseeing the Department's criminal functions. Will that be part of your portfolio at the Department?

Ms. GORELICK. Yes, sir.

Senator HATCH. That is your understanding?

Ms. GORELICK. Yes, sir.

Senator HATCH. Okay. The gang problem is one which affects my State as gangs from Los Angeles and elsewhere have moved into my home State of Utah. We have had almost 200 driveby shootings just this year, and Utah has never had a problem like this before.

The administration recently announced a new anti-gang initiative which is intended to strengthen the partnership between State and local law enforcement. The initiative's summary states that, "More needs to be done to keep pace with this problem on both the Federal and State level." The very same issue arises: Should that be federalized?

You say in your prepared statement, "We must ensure that those we ask to fight on the front lines have the financial and personnel resources and the legal and investigative tools that they need."

Now, in my opening remarks, which admittedly were a little lengthy, I outlined some of those personnel losses and reductions at a time when we really need to fight crime. You also indicated in your statement here this morning you are going to fight to try to get the resources that we need to do it.

I guess my question is: Will you do that? Will you fight for these resources? Because OMB has its own priorities. What the President is saying is not being backed by OMB. And I think it is important to me that you back the President and that we try and strengthen Federal law enforcement.

Ms. GORELICK. Senator, that will be a very high priority for me if I am confirmed. I believe most strongly that you have to have your resources to back up your policies. I have had briefings on this issue, and I understand that every effort is being made, where there are cuts in resources, to make sure that those cuts do not affect the number of agents who are actually involved in the investigative process and actually on the line. But this would be a very high priority for me.

Senator HATCH. Well, thank you. I think this administration has chosen what I consider to be the best Director of the FBI that I have seen in my lifetime. I think he is really doing a good job and, given the right tools, will do an even better job.

But we in the Senate, when Senator Biden and I led the fight for the Senate crime bill, the so-called Byrd amendment was passed which would provide that in the 250,000 personnel reductions recommended by Vice President Gore, that we would have around 22-plus billion dollars to be used for anticrime efforts. Will you fight to keep that \$22 billion utilizable in this great effort against crime?

Ms. GORELICK. Absolutely. I think the crime trust fund is just a critical tool in the fight against crime. If we are going to have an organized and collective and collaborative effort to address this terrible problem, we have to have the resources to do that, sir.

Senator HATCH. That is really important because the House is not coming along on that like they should. Maybe they will. But I think that Senator Byrd and Senator Phil Gramm of Texas, in coming up with this idea, have shown us a way to have the needed resources to be able to do what the President says he wants to do on crime and what certainly Senator Biden and I and others on this committee would like to see done.

So it is going to take your active support and your active advocacy to see that that happens. And, to me, if we do not have the money behind our anticrime efforts, we are not going to make any headway. So I am counting on you to do that.

Ms. GORELICK. I understand that, sir, and you have my commitment.

Senator HATCH. Thank you.

Now, all of us want the Justice Department to be successful in combatting crime and illegal drugs as well as the enforcement of other laws within your jurisdiction. There is a growing concern about the administration of justice in this past year. Repeatedly, nominees of the Department have been withdrawn, vacancies left unfilled; in some cases, it has been over a year before a nominee has been sent to the Senate. And this is just the first year of the administration.

In recent weeks, after less than a year of service, there is turnover in two of the top three positions in the Department. The Washington Post in an editorial yesterday mentioned that the Justice Department "has management and policy problems enough. The place is hurting."

Now, what do you believe needs to be done to address the concern that the Department has gotten off to a slow start and still has not settled down. And what can we do to help you?

Ms. GORELICK. Well, frankly, sir, I think the first thing you could do to help the Attorney General would be to get her a Deputy Attorney General. [Laughter.]

Ms. GORELICK. After that, I think we do need to address the vacancies that we have. We need to bring together a cohesive team and a coordinated effort, and that is very much what the Attorney General wants. I have spoken with her about it, and that effort will have all of my energy.

You can help, clearly, in the confirmation process and in moving not only this nomination but other nominations through, and I applaud your efforts in that regard to date. And I think you can help by being a sounding board and by not hesitating to make your views known about what you perceive to be the problems of the Department. You know you will find an open ear and an open mind in me.

I do think that the Department has wonderful traditions. It has wonderful personnel in its career personnel, and it is the job of the political leadership to liberate them to do what they do best.

Senator HATCH. It is a terrific Department.

The CHAIRMAN. If I can interject, it is keeping up a wonderfully bad tradition, and that is, the last administration was dreadful on nominations, and I made the point about that. And I made it repeatedly. And in fairness, this administration is dreadful on nominations. We started off with 109 vacancies when this President came in, the average vacancy was around 14 months before a name was even sent to this committee. This time around it is up to 128 or 124 vacancies, and there is no slowing up on the part of this fellow here. This committee has moved along. I urge you, Ms. Gorelick, that when you get there, tell them they had better start sending judges up to us more rapidly. There is no excuse. We average 7 weeks from the time we get a nominee until we, get the person out. It is not the bottleneck here. It is downtown. Something has got to be done.

Ms. GORELICK. If I might just comment on that?

The CHAIRMAN. Sure.

Ms. GORELICK. As a practitioner for 18 years, I know very well what happens in a jurisdiction when you are missing key judicial nominees, and I recall working with both of you on the bills to enhance the Federal judiciary. So you will have my full commitment on that.

Senator HATCH. Well, that is important because Senator Biden has spoken very truthfully on that. I felt that the greatest failure of the Bush administration was its failure to fill these Federal judgeship positions. As you know, most of them can be filled with people who are not partisan in any way, as they should be. And he is right in asking you to lend your influence and your effort in helping us to get the judgeships up here. And I pledge, as ranking member on this committee, that we will get them through.

Ms. GORELICK. Thank you.

Senator HATCH. There will occasionally be some disagreement, I am sure, but by one and large, we will get them through for you.

Now, just one last question because my time is coming to an end here. It is my understanding that Attorney General Reno has had under review for some time a proposal to merge the Department's Office of Professional Responsibility with the Office of Inspector General. Now, the Office of Professional Responsibility has a record and a reputation of independence in investigating allegations of misconduct and unethical behavior by lawyers and other professionals in the Department of Justice.

OPR has vigorously investigated Department officials under Democratic and Republican administrations. I believe the fact and appearance of such independence is really valuable.

Now, I note that the January 8, 1994, Washington Post ran a story and a headline, "President's Lawyers Tried To Limit Justice Department's Use of Whitewater Files." The story reads in part:

President Clinton's private lawyer attempted to negotiate unusual limits on how the Justice Department could use files about Whitewater Development Corporation that the White House agreed to turn over, officials said yesterday. David Kendall, Clinton's lawyer, was rebuffed when he asked Department officials to agree, they would not share the material with the Office of Professional Responsibility, the unit of the Justice Department that is investigating one aspect of Whitewater.

Now, I have written to Attorney General Reno about my concern regarding the merger. I am concerned that both OPR's role and independence be preserved, and I think the Attorney General should have a unit reporting to her, known for its independence, serving as an internal check within the Department. And I believe the fact and appearance of his independence will be seriously undermined if this office is placed in a subordinate position or under a subordinate official's supervision such as the inspector general or the functions curtailed.

Do you have any thoughts on this?

Ms. GORELICK. Senator, as Senator Sarbanes said, I have committed a significant part of my professional life to advocating professional discipline, participating in professional discipline efforts, and I feel very strongly that the Department of Justice must have a strong and effective and independent vehicle for the evaluation of issues of professionalism and ethics.

I have not had a chance to study the particular organizational issues, and I do believe and understand it to be before the Attorney General as we speak. But she must have and the Department must have the ability to self-evaluate and to ensure that we have the highest levels of professionalism and ethics within the Department.

Senator HATCH. OK. One last question. There have been concerns in recent months concerning the handling of certain cases in the Environmental Crime Section in the Environmental and Natural Resources Division of the Justice Department. A 325-page, March 10, 1994, internal review completely exonerated that section.

Now, in your view, is it now time, in light of the Department's own conclusions, for the Attorney General to come to the public defense of career prosecutors? Career attorneys in the Environmental Crime Section have met with the Attorney General to voice their concern a number of times.

Let me just say preliminarily that if a matter merits investigation, it ought to go forward. If a case should be prosecuted, so be it. But as you know, a number of career attorneys have been interviewed by congressional committees, and I have raised concerns about the degree to which this Department of Justice has allowed Congress to question career attorneys who may well feel that their future prosecutorial decisions are going to subject them to investigation in any individual case or cases.

I am also concerned that zealous bureaucrats at the Environmental Protection Agency may be seeking to intimidate Justice Department prosecutors with threats of running to Congress if decisions in cases do not go the way they want them to go.

A March 4, 1994, memorandum from some career attorneys in the Environmental Crime Section to some of their colleagues states:

The Attorney General was given a series of recent examples of the difficulties facing line attorneys. These included cases occurring within the last few months in which assistant United States attorneys and section attorneys had held up either commencing or declining a potentially high-profile investigation for fear of rebuke from the EPA in the event the investigation failed to turn up a prosecutable case, instances in which EPA agents explicitly threatened to "haul" prosecutors before Congress if they did not pursue cases regardless of prosecutorial merit.

Now, do you think that prosecutors can operate effectively in such an atmosphere? Normally we would want to stand up for Congress, but I think it is outrageous that these prosecutors have to be second-guessed by Congress in making these decisions or intimidated in any way or intimidated by a Federal agency if they do not meet what that agency thinks they should meet.

Are you concerned about career prosecutors having to make judgments in cases under the threat of investigation by Congress and of being called to Congress to defend their judgments? I am concerned about that, and I would like to hear your response to that, and I may have a response to you.

Ms. GORELICK. Senator, I think that one of the most important responsibilities of the senior leadership of the Department is to insulate from political influence, from outside influence, the decisions of career and supervisory attorneys to the extent humanly possible. And I understand that the Attorney General has said that the process of making available the line attorneys in this instance was the exceptional circumstance. I am aware that that has occurred in prior administrations, but in my view it should be the extraordinarily exceptional circumstance.

Senator HATCH. I want you to know that I agree with that because the political appointees of the Department, they are the ones who should be the ones responding to Congress about internal Department decisionmaking in cases so that the career attorneys are insulated. You know, Congress has a right to collect facts. We all acknowledge that. But if it questions how a case has been prosecuted, then the Department ought to send its political appointees to answer those questions, and I think it ought to be limited to that.

The CHAIRMAN. Thank you, Senator.

I might point out, under the leadership of Senator Thurmond and since I have chaired this committee, those kinds of cases we felt most appropriately should be referred to OPR, the Office of Professional Responsibility. If a sitting U.S. attorney or a prosecutor within the U.S. attorney's office is accused of not pursuing whatever the appropriate action is, then that is a matter that we get those cases over the years. We routinely refer them to the Office of Professional Responsibility rather than call them up here. I think that is the appropriate route to go.

Senator Thurmond, before you start, the distinguished Senator from Illinois has to leave and asked for a 30-second interjection, if she may.

Senator THURMOND. Sure.

OPENING STATEMENT OF SENATOR MOSELEY-BRAUN

Senator MOSELEY-BRAUN. Thank you very much, Mr. Chairman, and for your kindness, Senator Thurmond.

I would like in the first instance to say that I had an opportunity yesterday to meet with Ms. Gorelick. I am very pleased with this nomination and support her confirmation.

Ms. GORELICK. Thank you.

Senator MOSELEY-BRAUN. I would like, Mr. Chairman, to file for the record my statement.

The CHAIRMAN. Without objection, it will be filed.

[The prepared statement of Senator Moseley-Braun follows:]

PREPARED STATEMENT OF SENATOR MOSELEY-BRAUN

Mr. Chairman, As a former assistant states attorney, I was deeply troubled at the rapid decline of the Department of Justice during previous administrations. A once proud department had become a shadow of its former self, plagued by politicization, cronyism, ideological bias and simple mismanagement. But from the earliest days of his Presidency, President Clinton has demonstrated his commitment to restoring the integrity and credibility of the Department of Justice. That commitment was demonstrated last year by his nomination of Janet Reno to be the Attorney General, who has impressed Americans across the country with her courage and compassion, with her intelligence and her integrity.

But Janet Reno cannot do it alone, Mr. Chairman. The Justice Department is a massive and often unwieldy bureaucracy, with 80,000 employees and an annual budget of more than \$10 billion. Jamie Gorelick, the nominee before us today, understands what it takes to run a large bureaucracy. Throughout the past year Ms. Gorelick served as general counsel for the Department of Defense, overseeing the largest group of lawyers anywhere outside the Department of Justice. If confirmed I am certain that experience will serve her well.

Mr. Chairman, there are a number of important issues facing the Department of Justice. I hope today's hearing will be a serious discussion of the issues, and the role the nominee will play in them. With that said, I join you in welcoming the nominee, and I look forward to hearing her testimony.

Senator MOSELEY-BRAUN. Further, I have a letter which I received from the Hispanic Bar Association of the District of Columbia, lauding Ms. Gorelick in her tenure with the D.C. bar and speaking to her efforts in behalf of social justice and racial equality and empowerment. I am very pleased with this letter as well, and I would like to have this letter introduced as part of the record as well.

The CHAIRMAN. It will be placed in the record.

[See letter under Submissions for the Record.]

The CHAIRMAN. I thank you very much, Senator.

Senator MOSELEY-BRAUN. Thank you very much.

The CHAIRMAN. And I misspoke. The next in order, since Senator Hatch just questioned is a Democrat. The Senator from Ohio is next.

Senator METZENBAUM. The Senator from California asked if I would yield to her, and I am pleased to do that.

The CHAIRMAN. Fine. Delighted.

OPENING STATEMENT OF SENATOR FEINSTEIN

Senator FEINSTEIN. I have the same commitment that Senator Moseley-Braun has, so I thank you very much, Senator Metzenbaum.

The CHAIRMAN. Please proceed, and then we will proceed to Senator Thurmond.

Senator METZENBAUM. Are they excluding men from that meeting you are going to?

Senator FEINSTEIN. Actually, it is all the women Senators participating in a roundtable.

Senator METZENBAUM. Now you know how it feels, Joe. [Laughter.]

The CHAIRMAN. I want the record to show I have not said a word about this.

Senator FEINSTEIN. Welcome, Ms. Gorelick.

Ms. GORELICK. Thank you.

Senator FEINSTEIN. I am very pleased to have this opportunity.

You alluded in your opening remarks that your position will be that of a chief operating officer. In other words, you will be the top manager of the Department, if I understood that correctly.

Ms. GORELICK. Well, if I might amend that just slightly, I think the top manager would be the Attorney General.

Senator FEINSTEIN. All right. But you will carry out the line management.

Ms. GORELICK. Yes.

Senator FEINSTEIN. All right. In fiscal year 1994 the Department has 89,460 employees. In fiscal year 1995, in the President's budget, the Department will have 93,751 employees. That is a lot of employees.

I would just like to begin by asking if you would entertain really taking a good top-to-bottom look at how employees are deployed and what they are doing and whether the fight against crime is really well served. It is a huge Department.

Ms. GORELICK. I think that is a very appropriate and constructive suggestion. I do not know what efforts have been undertaken to date, but as you know, Senator, first we have done a similar review at the Department of Defense, and I think it was extremely useful. The first time that that had been done in a very long time. And I undertook a similar and parallel action within the legal resources of the Defense Department to look at how we deploy our resources. I think it is a signal and critical responsibility of every manager to understand how the resources are being used.

Senator FEINSTEIN. Now, I think there are real problems, and I want to give you a case in point, and I want to give you the Central District of California as a case in point.

I have just talked with the U.S. attorney in the Central District, Ms. Manella, and she informs me that there is only one assistant U.S. attorney in the Central District for every 91,000 residents, compared to 25,000 residents in the Southern District of New York and one for every 55,000 in New York's Eastern District. However, New York has gotten a waiver from any cuts.

She informs me that the Central District has been a leader in financial institution fraud prosecution, Lincoln Savings & Loan, health care fraud prosecution, violent crime. It has pioneered the use of the Armed Career Criminal Act in that district. And she believes that it is seriously undermanned. She also believes that with the FBI actually increasing its agents—in the past 2 years, they added over 100 agents, and they are going to be adding another 25 to 30 agents—obviously there are going to be more cases.

So I would like to point out that case in point and submit to you that there are probably others. This is the second largest U.S. attorney district in America, and right now probably the most active in terms of numbers of cases and real problems in the surrounding area.

Ms. GORELICK. Well, Senator, I appreciate your bringing that to my attention, and if I am confirmed, I pledge to look at that issue, and to look not only at the allocation of resources among U.S. attorneys offices, but the integration of our resources between investigative and prosecutorial. There must be a matchup between those two kinds of resources.

Senator FEINSTEIN. Thank you very much.

Now, as you know, I authored an amendment with Senator Metzenbaum's and Senator DeConcini's very, very active participation on banning the manufacture of assault weapons, and that legislation is now before the House of Representatives.

May I have your views on whether such weapons should continue to be available over the counter to any qualified buyer?

Ms. GORELICK. Senator, I wholeheartedly applaud your efforts and your leadership in addressing the problem of assault weapons, and particularly the very careful approach that you took so that there is real clarity with respect to what is a weapon and what is a sporting arm. And I think that this administration should be fully supportive of your efforts.

Senator FEINSTEIN. I would really like to encourage that because it is my belief that unless the administration comes really front and center, we are going to lose this in the House. And I think that particularly Justice has to come front and center in a very high-profile and important way.

Obviously it is controversial legislation, and I want to make one point to you. I have sort of taken the task of once a week now going on the floor and going over every incident in America with semi-automatic assault weapons. And what I am finding, as I review these incidents, is that they are becoming the gun of choice of teenagers, and this is frightening. Particularly the AK-47 seems to figure in many of these crimes, 16-, 17-, 18-year-olds, certainly the gun of choice in gangs and driveby shootings. So I really think and I am hopeful that the Department will take much more aggressive action.

Ms. GORELICK. Senator, as the mother of two young children, I can tell you that there is nothing more frightening than the prospect of guns such as these in the hands of young children. And where there is no sporting purpose, the possession and ownership and use of semiautomatic assault weapons really has no place in our society.

Senator FEINSTEIN. I am glad to hear you say that.

Ms. GORELICK. I will be personally very pleased to work with you on that.

Senator FEINSTEIN. Thank you very much.

I was very disturbed to read in the New York Times on Monday that two female FBI agents based in Santa Ana, CA, have claimed consistent sexual harassment on the job. Now, only 1,200 of the FBI's 10,300 agents—that is about 11 percent—are women.

Could you comment, please, on the priority you will assign both to enforcing current laws regarding sexual harassment and, where it is shown to exist, to eradicate it within the Department of Justice?

Ms. GORELICK. Clearly, sexual harassment in any workplace must be addressed forcefully, and in the Federal Government, which would be a leader in this regard, it particularly has no place. I have been very active at the Defense Department in efforts to eradicate sexual harassment both within the civilian and military workforces, and this is something of great personal interest to me.

I understand that Director Freeh has strongly committed himself on this issue, and I have great respect for him and high regard for him and would be most interested in working with him on this issue.

Senator FEINSTEIN. Well, let me just say I would hope that Justice would have a better record than the military. You know, I am aware of the fact that virtually nothing has happened to anyone involved in Tailhook, and I am hopeful that Justice will take it much more seriously.

Ms. GORELICK. Let me say in that regard my efforts have been very clear and very strong in that regard, and the work we have done at the Department of Defense will have proved, I think, a good training ground for any other effort.

Senator FEINSTEIN. Good. Let me touch on one last thing which involves me very much, and this is INS. It is the Border Patrol, it is enforcing our borders.

Immigration has become a very hot button, and no matter what you do, you are criticized for it. It is one of these no-win issues.

I believe very strongly—and my time, I see, is up—that the border must be enforced. There is a commitment to have by the end of the calendar year 600 additional agents targeted toward the Southwest border, and I would just like to request that you make that a priority as well to see that it happens and that the borders are enforced in our country.

Ms. GORELICK. It would be a priority for me as it is for the Attorney General, and as I understand it, that additional 600 would be complemented by an additional 400 in the following year also targeted, and I think that is a very, very important initiative, Senator.

Senator FEINSTEIN. Thank you. I look forward to working with you. Thank you very much.

Ms. GORELICK. It is mutual. Thank you.

Senator FEINSTEIN. Thank you, Senator Metzenbaum.

Senator METZENBAUM. [Presiding.] Thank you very much, Senator Feinstein.

Senator Thurmond.

OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Thank you, Mr. Chairman.

Ms. Gorelick, in looking at your resume, I am impressed.

Ms. GORELICK. Thank you.

Senator THURMOND. The excellent marks you made in college, your experience since then, your writings. If I ever apply for a job, I am going to get you to help me prepare a resume.

Ms. GORELICK. Thank you, Senator Thurmond. [Laughter.]

Senator THURMOND. Of course, you were over in the Department of Defense. We approved you in the Armed Services Committee for that, I believe.

Ms. GORELICK. Yes. And I have enjoyed working with you in that regard.

Senator THURMOND. Thank you. You have done so much to be so young. After all, you were born the last year I was Governor of South Carolina. [Laughter.]

Senator THURMOND. An article in today's Washington Post stated that perception of the Department of Justice, both inside and out, was that the Department is rudderless and in disarray. Additionally, the article noted that Associate Attorney General Webster Hubbell's resignation had a jolting and demoralizing impact at the Department. Additionally, one aide to Attorney General Reno was quoted as saying, "There is a real sense of shock around here."

Ms. Gorelick, maybe we should send some motivational tapes with you to the Department. How do you plan to lift the morale of the Department employees?

Ms. GORELICK. Well, I intend to work collectively and collaboratively with the wonderful people there to ensure that that Department is the best that it can be. I have never used motivational tapes, but I think I can motivate people to lead.

Senator THURMOND. Mandatory minimums have been enacted by the Congress for a number of crimes, although drug-trafficking offenses, offenses involving firearms, and violent offenders make up the bulk of Federal sentencing in this area.

Do you believe reform of mandatory minimums is advisable, or do you advocate treating drug offenders differently under mandatory minimums than violent offenders?

Ms. GORELICK. I think that mandatory minimums in the drug area send a very clear and important message. The administration has worked with this committee and particularly with you, Senator Thurmond, on the issue of a safety valve, and you will have my continuing work on the mandatory minimum issue with you if I am confirmed.

Senator THURMOND. As you know, the Attorney General is opposed to capital punishment. Do you support capital punishment?

Ms. GORELICK. I am personally opposed to capital punishment, but I, like the Attorney General, will have no trouble in enforcing it in the appropriate circumstances.

As you know, Senator Thurmond, I have been the adviser to the military justice system in which there is a death penalty. It has been sought during my tenure and granted in two cases during my tenure.

Senator THURMOND. Ms. Gorelick, as the ranking member of the Judiciary Subcommittee on Antitrust, Monopolies, and Business Rights, I have been supportive of the Department of Defense task force which is analyzing the antitrust issues involved in defense industry consolidations. I understand that you also have been very supportive of the task force.

Now, as you prepare to move from the Department of Defense, which is a purchaser of defense products, to the Department of Justice, which is the enforcer of the antitrust laws, do you expect your

views or perspectives on antitrust issues in the defense industry to change?

Ms. GORELICK. Senator, I not only was a supporter of the task force, but was one of its originators. The purpose of it—and I have had many discussions with Senator Metzenbaum on this—was to ensure that there was a dialog between the enforcement community, particularly the Department of Justice and the Federal Trade Commission, and the Defense Department on how to talk about antitrust as it applies in the defense industry. And the wonderful thing about this task force is that a consensus has developed between groups that heretofore had really not spoken with each other as to how to address this very difficult issue.

So I see no change of view, no change of perspective as necessary because the task force report, if accepted, will provide a clear vehicle for addressing the difficult issue of how to maintain competition in a period of incredible downsizing in this particular industry. And I am very pleased with the results of that process. I very much appreciate your support and Senator Metzenbaum's support on that issue.

Senator THURMOND. He and I have worked together on antitrust matters for several years.

Ms. Gorelick, I understand that the report of the task force, which is entitled "Antitrust Aspects of Defense Industry Consolidation," will be made available to the Department of Justice for its review in the near future. As the nominee for Deputy Attorney General, will it cause you any concern if the Justice Department does not fully agree with the views of the task force? And if so, how might you resolve those concerns?

Ms. GORELICK. Well, inasmuch as the principal deputy to Assistant Attorney General Anne Bingaman has served as a key member of the task force, I must say I do not anticipate any such problem. This has been a real consensus effort.

Should a problem arise, I will be someone who will try to work such a problem through. But I just do not anticipate that at all.

Senator THURMOND. The administration's proposed 1995 budget terminates the Byrne law enforcement formula grants which were funded at \$358 million in 1994. These grants are used by the States for a variety of law enforcement purposes. In fact, over 950 task forces and drug units have been established or expanded throughout the country through the use of these formula grants. These grants are also used to hire prosecutors and train law enforcement personnel.

Ironically, while the administration is proposing the elimination of this successful formula program, which ensures that each State gets its fair share of law enforcement resources, the Department has proposed increasing the funds available for discretionary grants.

In your prepared statement, you note that when you recently met with law enforcement, you told them that, "They would have my full support in getting them the resources and tools they need." You went on to say, "If confirmed, I will make good on that promise."

Law enforcement needs the resources provided under the Byrne grant program. Given the seriousness of our crime problem, do you

believe the elimination of a proven, popular law enforcement program like Byrne is a good idea?

Ms. GORELICK. As you know, Senator, I am truly committed to making sure that State and local law enforcement has the resources that it needs, and the concern of State and local law enforcement about the Byrne grants has been one of the subjects of this new and very fruitful dialog that I have had with those groups.

I do understand that there are new funds being made available to State and local law enforcement in this budget, but I will very carefully look at the issue to ensure that there is no diminution of the support that we must give to State and local law enforcement.

Senator THURMOND. Ms. Gorelick, former Deputy Attorney General Phil Heymann criticized the Clinton administration for using former Associate Attorney General Web Hubbell as a key communications link between the Justice Department and the White House. What communication structure or process would you recommend in order to protect against politicization of the Justice Department by the White House?

Ms. GORELICK. It is critically important that the Department of Justice maintain its independence and its professionalism and that we ensure in any way that we can that particularly the decisions of line prosecutors are insulated from any inappropriate political influence.

If I am confirmed as Deputy Attorney General, I will follow the policies set forth in an exchange of letters between the Department and this committee in that regard toward this end; that is, that communications with the White House will be limited to the Attorney General, the Deputy Attorney General, and the Associate.

I clearly believe that I will be part of that communications process, and it would be my job to ensure the insulation of decisions from political influence.

Senator THURMOND. Mr. Chairman, I have several more questions. Would you allow me one more question before I go.

Senator METZENBAUM. I would always allow you one more question.

Senator THURMOND. Thank you.

Senator METZENBAUM. I might say that Senator Biden will be back. He had to leave for a short period.

Senator THURMOND. Thank you.

Ms. Gorelick, former Deputy Attorney General Philip Heymann has criticized the Senate-passed crime bill as largely irrelevant to any realistic law enforcement effort, disparaging, among other things, Republican proposals to increase Federal prison construction.

Mr. Heymann argues that the Federal Government does not need additional prison space because existing Federal prisons house many non-violent, lower-level offenders who should not be in prison. He cites as evidence a recent Department of Justice study which finds that 21 percent, or 16,316, of all Federal offenders within the custody of the Bureau of Prisons are low-level drug offenders for whom there could be alternative punishments.

Low-level drug offenders are defined in the study as persons who are not sophisticated criminals. This broad definition fails to account adequately for mid-level conspirators and fails to take into

account the quantity of drugs with which an offender may have been involved. It also includes people with criminal records.

Now, Ms. Gorelick, would you characterize a mid-level drug cartel member involved in the conspiracy to smuggle several tons of cocaine into this country a low-level drug offender as the Department study concludes? Or would you say couriers who on several occasions knowingly transported millions of dollars of narcotics into our States are low-level offenders who should not be in prison?

Ms. GORELICK. Senator, as you know, this administration has supported a limited safety valve for mandatory minimums for "low-level offenders," and the definition is much more narrow than the one that you have just stated. I fully support that much more narrow reading.

Senator THURMOND. Thank you very much. I think you are a very intelligent and dedicated lady, and I will be glad to support you.

Ms. GORELICK. Thank you, Senator.

Senator THURMOND. Thank you, Mr. Chairman.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. With that powerful support, I do not know what else I can add. But there is no question, Ms. Gorelick, that you have excellent credentials, and there is no question you are a highly qualified person, and more important probably is that you have been recognized not only for your ability but for your perspective on issues from the Women's Bar Association, from the various Bar Associations. Being president of the District of Columbia Bar Association is, indeed, a high tribute to you.

Ms. GORELICK. Thank you.

Senator METZENBAUM. As you and I know, we had a considerable discussion concerning the Defense Department and the task force, and I think we were able to resolve that.

I do have a few questions remaining that concern me a bit, and I had indicated at our meeting the other day that I am concerned about the qui tam whistleblower lawsuits. You know what they are. An individual working in a plant finds malfeasance on the part of the company, fraudulent conduct on the part of the company, and under the law that individual can maintain an action and has a right to share in the proceeds.

I think it is an extremely important means of combatting fraud, and the Senator over there to my left, who very seldom is on my left, is a very strong advocate of strengthening the qui tam legislation, and I support him in those efforts. Whistleblower suits have been highly effective in fighting and deterring fraud against the Government, saved the taxpayers a bundle, and I think that Senator Grassley's efforts to ensure that whistleblowers come forward and disclose fraud that costs taxpayers millions of dollars is, indeed, good public service.

I would like to know if you share my views that we need to have appropriate incentives necessary to promote and protect whistleblower actions, and I would also like at the same time to get your view with respect to the Grassley bill.

Ms. GORELICK. Certainly, Senator. First, let me say that I strongly support the current qui tam bill and the efforts that you and

Senator Grassley have made to strengthen it. I have at the Defense Department strongly advocated our efforts to root out fraud with both the criminal sanction and the civil sanction. Those are just two tools. Our voluntary disclosure program is another and qui tam is another. And so I am very much in favor of qui tam as a very, very important tool. I also believe in the constitutionality of that statute.

As the general counsel of the Defense Department, there are two issues that institutionally I have tried to ensure are taken into consideration, and they are making sure that we have a robust voluntary disclosure program and making sure that attorneys do not have a conflict of interest as qui tam relators. But I would say in general I am extremely supportive, and I believe that the very minor differences between Senator Grassley's proposal and the positions under review at the Defense Department can easily be resolved, because I think our disagreement is not over goals but over strategies.

So let me say I look forward to working with you and with Senator Grassley, with whom I met to discuss this issue, to resolving and strengthening that bill.

Senator METZENBAUM. Did you have much involvement with this in private practice?

Ms. GORELICK. I did not practice in the area of qui tam. I did work in a somewhat related area with respect to whistleblowers in the ethics area and represented individuals who had reported ethical violations to their employers.

Senator METZENBAUM. You were not involved in the defense side as far as representing defendants in those cases?

Ms. GORELICK. Never. I have not represented anyone on either side of qui tam. It has not been an issue that I have any personal stake in or background on, other than in my current position as general counsel of the Defense Department.

Senator METZENBAUM. I would guess that Senator Grassley would get into that further, and as long as he is here I will leave that to him. Let me ask you, you wrote three articles on RICO actions. One was "Update on Establishing Damages in RICO Actions," "The Measure of Damages in RICO Actions," and "Establishing Damages in RICO Actions." I have not read those articles and I know nothing at all about them. Can you tell me what your conclusions and the thrust of the articles are?

Ms. GORELICK. They are very old articles, Senator, so I will try to summon them up myself.

Senator METZENBAUM. So am I, but that doesn't make them irrelevant. [Laughter.]

Ms. GORELICK. The thrust of the articles was that—at that time, RICO actions were relatively new and the question I was looking at was if you as a lawyer are representing a plaintiff in an action under the racketeering laws, how do you measure damages. It was a fairly narrow and technical but, to a practitioner, important issue. Those were the concerns that I was principally addressing in those articles.

Senator METZENBAUM. Have you advocated any cutback in the right to bring RICO actions?

Ms. GORELICK. No.

Senator METZENBAUM. Let me change the subject totally. One of my greatest concerns has to do with the death penalty because, frankly, there are instances in which I think that I personally could be the executioner when some things happen. But realistically speaking, on a broad-based basis too often the death penalty has been applied in a racist manner. Too often, the death penalty has been found—I think in the last year there were four people freed where somebody else came forward and said that—they were on death row and somebody else came forward and either proved or was proven to be the killer or to have committed the heinous crime.

The concern about the death penalty, as you know, was most eloquently expressed by Justice Blackmun in a recent dissent where he stated that, quote,

Twenty years have passed since this Court declared that the death penalty must be imposed fairly and with reasonable consistency or not at all, and despite the efforts of the State courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice and mistakes,

end of quote, a very powerful statement, a very important statement from a respected member of the Supreme Court.

Now, within the last few days we had a report released from the House Subcommittee on Civil and Constitutional Rights, chaired by Don Edwards, indicating that racial minorities are being prosecuted under Federal death penalty laws far beyond their proportion to the general population or in the population of criminal offenders. The subcommittee's analysis of prosecutions under the Federal death penalty indicated that under the provisions of the Anti-Drug Act, 89 percent of the defendants selected for capital prosecution have either been African- or Mexican-Americans.

Incredibly, all 10 of the defendants most recently approved for Federal capital prosecutions have been black. This bias in death-row prosecutions is further evidence of Justice Blackmun's conclusion that the death penalty experiment has failed, and the whole situation is compounded by the fact that we have no explanation from the Justice Department for the racial disparity.

I just would like to get your view as to whether the Justice Department will undertake efforts to establish fair and clear guidelines to prevent racially-biased capital prosecutions in the future. I have spoken in many instances about all the horrible stories of people losing their lives who were found not to have been guilty and too often it was black people who paid the penalty.

Ms. GORELICK. Senator, I understand your perspective and share your concern that the death penalty sanction not be used in a racially-motivated or discriminatory way. I do understand that this concern is being addressed at the Department, as you suggest, by the drafting of guidelines for the review of the application of that sanction and the seeking of that sanction. It is not an issue that I am familiar with and it would be something I would look into, but I very much sympathize and adopt the concern.

Senator METZENBAUM. I don't know, frankly, whether or not efforts are being made to establish those guidelines. I was really asking the question of would you establish them? If they are, fine, but

if not, would you be willing to undertake to bring about the establishment of such guidelines?

Ms. GORELICK. Yes, and I believe that that is consistent with a process that is ongoing right now.

Senator METZENBAUM. Thank you very much. I think my time is expired.

Senator Grassley.

OPENING STATEMENT OF SENATOR GRASSLEY

Senator GRASSLEY. Thank you, Senator Metzenbaum, for your fine comments and support of the concept of qui tam, and thank you for the support that you have given me in the past and have pledged to give me in the future in this.

Congratulations once again Ms. Gorelick, and good afternoon to you.

Ms. GORELICK. Thank you, Senator.

Senator GRASSLEY. I want to thank you, too, for taking time to come to my office to meet with me yesterday afternoon.

As you know, during my Senate career I have been very involved in defense procurement reform. I have kind of seen it as a very uphill battle, and I think the work on the present qui tam, legislation, reaching agreements and getting the bill moved along in the process is a repetition of that uphill battle. I had my share of battles, of course, with the Republican administrations in the past on qui tam, and now it seems I am having some of those same fights in your administration.

I think that my greatest accomplishment in this whole context of defense procurement reform was the False Claim Amendments of 1986, the so-called qui tam suits, which allow citizens with knowledge of fraud to sue culprits in the name of the United States. The law has brought in, if I can remind my colleagues, \$588 million, and that has been since 1986. And most of that has been within the last 3 years. So I want to talk with you, if I could, as a new nominee about DoD's and Justice's policy on that law, particularly in connection with amendments that are pending.

I want to thank you for answering for Senator Metzenbaum your feeling about the constitutionality. I thank you very much for that. I hope it is quite obvious, though, that it is constitutional, in light of the opinions of at least two different circuits on that point, and the refusal of the Supreme Court recently to hear the Boeing case. So I thank you for that.

I guess a natural follow-up to Senator Metzenbaum's question would be the extent to which you would press the Department to take that position and actively defend the law because I have been trying to get the Department to say—and we have had nothing negative from anybody high up in Justice toward qui tam, but we haven't been able to have them say that it is the policy and that they will defend it in the Supreme Court, as opposed to our Senate counsel having to defend it.

Ms. GORELICK. Well, Senator, it is my belief that that problem is not one of substance, but rather perhaps one of process, and I would be happy to advocate that position within the Department and I would not foresee an issue in that regard. But I obviously cannot commit in my current role for the Department of Justice,

but let me say in that regard and let me reiterate what I said to Senator Metzenbaum. I applaud your efforts with regard to qui tam. I think you have made an incredibly excellent contribution to the fight against fraud, and I would enjoy and look forward to working with you in strengthening that law.

Senator GRASSLEY. Thank you. As I get more specific, I want to say that as I ask some questions, don't read into it that I am suggesting anything sinister about meetings you might have. I have meetings all the time in my job. I know you have to have meetings all the time in your current position with DOD and other Government positions you have had.

What I am trying to get, at just as background, not just for you but for other people, is the fact that it is somewhat mysterious what drives certain interests on this qui tam issue and how those interests show up in the various bureaucracies of our government, particularly Defense and Justice. That is what I am trying to get at here, not only because of your past and future role on this issue, but also to educate my colleagues as we consider qui tam legislation.

How were you involved in the development of the Defense Department's position on qui tam legislation?

Ms. GORELICK. I need to give you a somewhat lengthy answer because I need to describe the role of the general counsel in that regard. The Legislative Reference Service of the Department of Defense reports to the general counsel of the Defense Department and its job is to discern what the position of the various relevant components of the Department of Defense might be with regard to proposed legislation, whether it is proposed internally within the administration or whether it is in response to a proposal such as yours. And it is also the responsibility of that office to resolve disputes within the Department and to address disputes or differences of view within the administration so that the administration can speak with one voice.

Because qui tam is an issue that crosscuts through the Department of Defense, the entities that are interested in it are the Deputy Under Secretary for Procurement Reform and our inspector general's office. It is thus the responsibility—it falls to the general counsel's office to determine what their views are as best we can and to respond for the Department in this call for views.

That effort within my office was assigned to the office of the Deputy General Counsel for Legal Counsel, who assigned an attorney to it whose job it was to discern the Department's views. The proposed views statements, as they are called, then come up through the relevant deputies to me before they are put into the inter-agency process. So, that is a long answer. The short answer is that, in general, my activities with regard to any particular piece of legislation are usually fairly small. It is done more often than not at a staff level, and I would say that with respect to qui tam that would be the case as well, not no involvement, but not a tremendous personal involvement.

Senator GRASSLEY. Now, within this description you gave me, and I thank you for the description, you would naturally have had some contacts with defense industry representatives concerning qui tam legislation, like maybe telephone calls and meetings and cor-

respondence and things like that? Again, I would meet with those same people, so I am not suggesting anything sinister. I just want to know if you have had meetings in the process that you have described.

Ms. GORELICK. I can only recall one meeting at which representatives of the defense industry raised the issue of qui tam with me personally.

Senator GRASSLEY. Then it would also be proper for your staff—whether you would know it or not, would your staff and counsel that you assigned to this specific job have contact with industry representatives concerning qui tam legislation?

Ms. GORELICK. Certainly, if representatives of industry were interested in a particular piece of legislation such as this one, they certainly would feel free to contact my staff, as would individuals who might be interested in pressing on the other side. We would be open to hearing all perspectives.

Senator GRASSLEY. And, again, there wouldn't be anything wrong with you authorizing, but I assume you authorized and at some time would direct your staff to make such contacts or to respond to contacts made to them?

Ms. GORELICK. In general, there would be a general direction to be open, if that is what you are asking, certainly.

Senator GRASSLEY. To flesh out your role in this matter, I would like to review just a very few—

Senator METZENBAUM. May I point out to my friend from Iowa that your time has expired?

Senator GRASSLEY. OK.

Senator HATCH. How many questions do you have?

Senator GRASSLEY. Well, this is a good time to stop and then I will come back.

Senator HATCH. Why don't you let him just—

Senator GRASSLEY. No. I need—

Senator METZENBAUM. Well, I see Senator Cohen is here. It is 10 minutes—

Senator GRASSLEY. I need another 15 minutes.

Senator METZENBAUM. Well, then, I think we ought to let Senator Cohen go, and hopefully Senator Biden will be back because I myself must leave.

Senator Cohen.

OPENING STATEMENT OF SENATOR COHEN

Senator COHEN. I thank Senator Metzenbaum. I won't take very long and perhaps Senator Grassley could then move back to his questions.

I couldn't help but watch you as all of the accolades were being delivered about your experience and when they mentioned that you were a graduate of Harvard Law. You may recall the story about Justice Oliver Wendell Holmes, Jr. When he was at the peak of his career if one can say there was a peak of his career, he was brought to the Harvard Law Library. They unveiled a portrait they had painted of him and asked for his reaction to it. He looked up and said, "it is not me, but I am glad you like it." [Laughter.]

Senator COHEN. In your particular case, the portrait of you is you, and most people like what they see.

Ms. GORELICK. Thank you, Senator.

Senator COHEN. Of course, I have had an opportunity to work with you fairly closely in the Defense Department and you have done heroic work, particularly being thrown into the field of trying to define how the issue of gays in the military should be resolved. I must say that you really labored long and hard and came up with some good answers to tough questions.

Ms. GORELICK. Thank you.

Senator COHEN. In your opening statement, you said that you are going to make good on the promise to get the law enforcement agencies all the tools and resources they need. Does that mean you are going to ask for more resources than are currently allowed in the budget?

Ms. GORELICK. I have not had an opportunity, Senator, to become intimately familiar with the budget, but I do view that as an extremely high priority.

Senator COHEN. I came in at the tail-end of Senator Grassley's comments on qui tam legislation and it sounded like he was headed in the direction of asking whether or not there is either an actual conflict of interest or the appearance of a conflict of interest. For example, President Clinton has spoken out quite aggressively against the so-called revolving door; namely, that we have people who serve either briefly or for some length of time in Washington and then worked at go out the door into the private sector and come back in. He said that this creates the appearance that somehow the public's business is not being conducted free of any particular private interest. He has been concerned about that.

In your particular case, because you worked in the private sector representing defense contractors and then worked at the Defense Department and then came over to Justice, the questions about the revolving door naturally arise. I think Senator Grassley is taken exactly at his word; he just wants to explore those regions without in any way casting any aspersions upon you.

How do you deal with this issue? By the way, it is important to point out that we are all products of our pasts. Not one of us is untouched or unbrushed by the wing of experience. We are all shaped by our backgrounds.

Senator Grassley was a farmer. He still farms. He comes from a farming State and has farming issues of interest to him. Senator Metzenbaum comes out of the corporate world in terms of antitrust legislation. Each of us brings a background, but it is different in Congress. We are held accountable every day, being challenged about our backgrounds or our "special areas of interest."

The same is not true of the executive branch. You are accountable to your superiors, or the Attorney General, or ultimately to the President of the United States, but you don't have the same kind of scrutiny and accountability that we do. Therefore, we have very stringent rules for members of the executive branch.

In your case, former clients were defense contractors. I recall John Tower. When he was up for confirmation as Secretary of Defense, charges were leveled against Senator Tower that while in the private sector, following a distinguished career in the Senate, he had a number of clients who were defense contractors. Critics

charged that this would tarnish his ability to make unbiased policy decisions. How would you handle that Ms. Gorelick?

Ms. GORELICK. Well, I thank you for giving me the opportunity to address that issue. I was blessed with a very varied and wonderful law practice, and among the clients that I represented about 10 percent of my work was for companies and individuals in the defense industry. But I am no more a captive of that industry than I am of National Public Radio or the American Association of Retired Persons or many, many other clients that I represented.

There are benefits, too, to having worked with particular industries. You learn a great deal, and it would be a shame if the only people in the executive branch who could act with respect to particular areas are people who don't know anything about them. I think the American people would be the losers in that regard.

Just so that you understand, I have taken a very strong and aggressive stance against fraud at the Defense Department. In the last 6 months, we have gotten over \$200 million in restitutions. We have brought over 600 indictments. This is a very vigorous and aggressive program. All of those numbers are up in this administration, and I would bring the same strength and dedication to that effort to the Department of Justice.

Let me say, too, that I don't think you were here for this part of it, but I have not participated in private practice on the issue of qui tam. I have never represented anyone on either side. I have never taken a position. I have never had to address the issue whatsoever, and frankly no client that I represented in private practice in other aspects of defense contracting has attempted to influence me in that regard.

Finally, with respect to accountability, I must say that though we do not have elections every 2 years or every 6 years for individuals in the executive branch, I do feel that there is a rather substantial level of oversight and I don't expect that any misstep I might make could ever be hidden. I am strongly committed to the ethics rules and have abided by them to the letter and in the spirit in which they are written.

Senator COHEN. My experience with you confirms that as well.

Ms. GORELICK. Thank you, Senator.

Senator COHEN. I was not here for some of the testimony you have given, but I did hear Senator Biden, the chairman, talk about the Federal laws we have. One of the things that he and I have worked on is antistalking legislation. We called for a study by the National Institute of Justice and the Institute came up with a recommendation for a model statute on stalking.

There is considerable pressure to make stalking a Federal crime, and I was wondering if you had had a chance to look at whether we should add another Federal criminal statute to the books.

Ms. GORELICK. I have not had an opportunity to look at that. Clearly, that is an area, the issue of stalking, that would be of great interest to me. But the decision whether the appropriate remedy is a model State law or Federal activity is one that I would have to study more.

Senator COHEN. During the year, I would like to talk to you about stalking. Just one final point; I see the time is about to expire. Insufficient attention has been directed to industrial espio-

nage. Major companies and, indeed, countries have targeted the U.S. industrial base for espionage activities. We are now focused upon Mr. Ames and what went wrong there. But we are not only talking about defense targets, not only talking about our intelligence services being targeted. Also, we must focus on the fact that our industrial base is being targeted.

A substantial effort is underway on the part not only of enemies and adversaries but also allies. I will not take the time today to talk about who those allies might be. It is pretty well known.

To date, the focus has been on protecting defense-related types of technology. I would respectfully suggest that the FBI, the Justice Department, and the Congress have a great deal more to do to advise and alert U.S. companies of the measures they have to take to protect very costly, expensive—some of them subsidized by the taxpayers—research and development procedures and technologies which I think have become the major targets of many, many countries.

Ms. GORELICK. Well, as you know, Senator Cohen, one of my major responsibilities over the last year and something that I have spent a great deal of time on is the issue of intelligence and the proper uses of intelligence and the focus of the intelligence community's efforts.

This is an area that the Attorney General has specifically said that she would want me to participate significantly in, and it is an area that interests me and that I think bears much further study and attention. So I would be very pleased to work with you on that.

Senator COHEN. Thank you very much.

Ms. GORELICK. Thank you.

Senator COHEN. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator.

Two things. One, I was going to question next, but Senator Grassley has some more questions, and he has a scheduling conflict. But before we even do that, would you like to take a break? You have been sitting there a long time.

Ms. GORELICK. No, sir.

The CHAIRMAN. OK.

Ms. GORELICK. Thank you.

The CHAIRMAN. Senator Grassley.

Senator GRASSLEY. As I said, I wanted to refer to some of the papers we had released to us.

Ms. GORELICK. If you might excuse me for a moment so that I can make sure that I have copies.

Senator GRASSLEY. Your files record a meeting that you had on June 23 with a Mr. John T. Kuelbs—I do not know whether I pronounced that right—vice president and associate general counsel of Hughes Aircraft, and Bob Wallick, a lawyer with Steptoe and Johnson. Mr. Kuelbs' letter asking for the meeting and your handwritten notes indicate the meeting concerned the section 800 panel on streamlining procurement laws, proposals for changes to the qui tam law.

I hope that I have just given a fairly accurate summary of that meeting. Could you please explain for the committee who Mr. Kuelbs and Mr. Wallick are and what the section 800 panel was?

Ms. GORELICK. Mr. Kuelbs is, I believe, with Hughes, and Mr. Wallick was, when I last met him in any event, a partner in a Washington law firm who was head of the so-called section 800 panel which was established under the Defense Authorization Act to look at various issues relating to procurement reform. It produced a report about a foot-and-a-half high or a set of reports that cover the landscape with respect to procurement reform. And Mr. Kuelbs wrote to me and asked whether I would meet with Mr. Wallick to discuss—very early in my tenure—the section 800 panel report, or at least to alert me to what was in the report. I believe we had a 15-minute meeting where they described the issues that were in the report that they would hope that I would take note of.

Senator GRASSLEY. Would you describe the proposals that they brought to your attention—and this is my characterization—as limits on qui tam?

Ms. GORELICK. Honestly, Senator, the meeting was so early in my tenure and written on for me very little background on the issue that I have no real independent recollection of the meeting.

My recollection was that they wanted me to make sure that I understood that there were proposals to change the qui tam laws and that these were issues that I should look at.

Senator GRASSLEY. OK. I do not find any fault with your answer, and you would have this, presumably, in your file. But your notes indicated that they wanted to discuss retroactivity, No. 1; No. 2, statutes of limitation; and, No. 3, Government employees' involvement.

All I would say is that I think that would be at least what I have characterized as their wanting to limit the impact and the use of qui tam.

Ms. GORELICK. The subjects that you refer to are, I believe, the ones that they raised with me. Basically they were raising topics with me that they would hope that I would look at.

Senator GRASSLEY. Well, they are the same ones that they raised with us, too.

The CHAIRMAN. Senator, if you would yield for a moment?

Senator GRASSLEY. Yes.

The CHAIRMAN. It is clear they were not trying to expand qui tam.

Ms. GORELICK. I am sure that is right. They were bringing to my attention issues relating to qui tam, and I honestly have no independent recollection. But I am sure, given where the defense industry is coming from on that, that that is very likely.

Senator GRASSLEY. Thank you for your help, Mr. Chairman. I wish I had gone to Syracuse Law School.

The CHAIRMAN. I am sure they wish you had, too, but I do not because you are too tough as it is. He is the only nonlawyer here that knows more than most lawyers.

Senator GRASSLEY. Were you aware at the time of the meeting that Hughes had been a defendant in at least nine qui tam actions since 1986 and that it had paid the Government more than \$11 million in connection with those cases?

Ms. GORELICK. No.

Senator GRASSLEY. OK. Let me say, considering that, and you did not know it, and that is legitimately that you not know it, con-

sider those facts—I am not asking if you did know them and should you have known them, but considering those facts, would you think that these companies' interests might be adverse to the interests of the taxpaying American public when it comes to legislation like qui tam?

Ms. GORELICK. Senator, this is really picking up on Senator Biden's remark. I would assume that defense contractors would have views on qui tam that were in their interest, and there would be certain points that they would make to anyone—the Department of Defense or anyone else—that would be in their interest only. There would be some points that they might make that might also reflect an interest of the Department of Defense, and there might be some that would be contrary to the interests of the Department of Defense.

The job of a public servant is to listen to them, listen to the views and distill what is in the interest of the American people.

Senator GRASSLEY. There is at least one official at Justice that found some problems with the section 800 report. According to the notes that your staff provided us, in a conversation between a Justice official and a lawyer on your staff, the Justice official concluded that the section 800 recommendations on qui tam done by Mr. Wallick—and I would quote here—"gut the False Claims Act."

Would you agree that Mr. Wallick's section 800 panel recommendations would gut the False Claims Act?

Ms. GORELICK. Senator, you are reading from notes of a meeting I did not attend and they reflect the thoughts of someone I do not even know who it might be. I was not aware of that sentiment until I started to read these materials that I had not heretofore seen.

Senator GRASSLEY. Well, I am not sure that I would want you to comment just upon your reflection. I am kind of asking what you know now and putting what you know now with the meeting, if you have to, or just for your opinion now.

Ms. GORELICK. Let me say this: As you and I discussed yesterday, there are a number of the recommendations in the section 800 panel report that I do not adopt, that I do not think are in the best interest of the Department of Defense or the American taxpayer. There are two concerns that are reflected therein that I do think reflect interests of the Department of Defense. In other words, I do not think personally, if you are asking me, that the right to dismiss a case needs to be vested in anyone other than the U.S. Government. And I agree with your approach in that regard.

There are other issues relating to retroactivity and statute of limitations that are not important to me. The two issues that are important to me are issues, again, as I stressed earlier, that relate to strategies, not goals. The two issues relate to the voluntary disclosure program at the Department of Defense and a potential conflict of interest for attorneys working at the Department.

Senator GRASSLEY. Can I have time?

The CHAIRMAN. Yes, go right ahead.

Senator GRASSLEY. Thank you.

The CHAIRMAN. You can finish up. Take the time you need.

Senator GRASSLEY. Based on these notes, the point that I am trying to make here is there is a person that is involved with writing

these recommendations in the section 800 report, and this person feels that these recommendations gut the False Claims Act. Notes from telephone conversations of people on your staff with George Phillips, an aide to Frank Hunger, they record Phillips saying the False Claims Act, a portion of section 800 report was "done by Robert Wallick who is now retained by the industry. He took control of recommendations, and Phillips thinks they gut the False Claims Act." When I said Phillips, that is my basis for saying that Justice feels that they gut the False Claims Act.

You had a lawyer on your staff that you had tasked to work on qui tam legislation working under your direction until you recused yourself from the issue upon your nomination. Is that correct?

Ms. GORELICK. Yes.

Senator GRASSLEY. She dealt with my staff as well as other congressional staff, I am sure—and, again, nothing wrong with that. Contacts of this nature, of course, are very routine as we advance the legislative process.

Your staff attorney drafted a DOD position on my qui tam legislation; is that correct?

Ms. GORELICK. Yes.

Senator GRASSLEY. According to internal memoranda prepared by your staff attorney, the section 800 report is "essentially what DOD supports" on qui tam.

If the DOD's position on qui tam essentially adopts the section 800 proposals, and the section 800 proposals would gut qui tam, according to the Justice official that I quoted, isn't it fair to conclude that DOD's position would also gut qui tam?

Ms. GORELICK. Let me say two things. First, the position of the Department of Defense was generated after discussions with the inspector general and the office responsible for procurement reform. And it was not intended to mouth the views of defense contractors. It was intended to reflect the views of the people responsible for that particular program.

The second point I would make is that that memorandum was drafted before the Department of Defense ever heard any views from the Department of Justice. And since we have engaged in that discussion and colloquy, the two Departments have come to agree with each other on the appropriate approach to qui tam.

Senator GRASSLEY. Well, recounting a meeting with the Department of Justice, the memo said that Hunger's aide said that, "While Justice is in basic agreement with DOD's position, he believes that Congress is likely to pass this bill in some form and that it would be more effective for the administration to support a more moderate bill in some form than to oppose Senator Grassley's legislation altogether or to suggest the reforms set forth in the section 800 report, which is essentially what we support."

Do you know how your staff attorney developed the Pentagon position on qui tam? Did you give her particular guidance or direction? Did you recommend she consult industry officials or anything to that extent?

Ms. GORELICK. My only instructions were—and I believe she followed them—to talk to the clients within the Department, and the two clients within the Department, the two components within the Department that had an interest in this, were the inspector gen-

eral's office and the Deputy Under Secretary for Procurement Reform.

My view was the position of the Defense Department ought to reflect their views about what was good for enforcement and what was good for procurement reform. And if they were satisfied, then we would be satisfied.

Senator GRASSLEY. Well, documents do disclose, in response to my questions, at least one dozen contacts between your staff attorney and Henry Hubschman, general counsel for GE Aircraft Engines, and most of these contacts were made around the time that we were trying to get markup on S. 841.

I hope that you can see maybe here what I am trying to get at. The False Claims Act has yielded more than half a billion dollars from the Federal treasury. I think it is a law that works, and I think you have indicated you feel it works as well. Defense contractors, often the subjects of False Claims Act lawsuits, of course, do not like the law. They opposed it very strongly in 1985 and 1986 when we were trying to get it passed. They want to gut it now. And I think you conceded that to me yesterday in my office when we were talking about this.

To the extent the Pentagon and the defense industry are working together to strip the False Claims Act, I have, of course, serious concerns, and the Pentagon/industry efforts may be undermining any attempt that the Department of Justice has been making—in attempts to advance the False Claims Act. If I may, I would like to ask you about a January 24th memo from your staff attorney, addressed to you, regarding my pending bill, and I am going to read the contents of the memo. It is based upon my staff's notes, if I could read it into the record.

Subject: Proposed legislation on qui tam. I spoke this afternoon with Henry Hubschman, general counsel, GE aircraft engines, who has been involved in industry general counsel's efforts to oppose Senator Grassley's pending legislation on qui tam reforms. He advised me that Justice is preparing a position paper on this legislation that takes a substantially different view of the legislation than our position, which is reflected in my memorandum of September 27, 1993, and in Sam Brick's memorandum of November 4, 1993, conveying DOD's comments. Both attached.

Henry said that Chuck Ruff who has testified before Congress on this issue on behalf of the aerospace industry's association, has discussed the issue with Frank Hunger's deputy, George Phillips. Mr. Ruff's impression is that Justice's position is

Let me start over again.

Mr. Ruff's impression is that Justice's position is not a well-informed one and is motivated more by the desire to appease Senator Grassley than by substantive support for the legislation. Henry also notes that Andy Effron, general counsel to the Senate Armed Services Committee, has looked at the legislation and opposes it for the same reasons we have offered. OMB is waiting for Justice's views before it coordinates the administration's position. Our position would be undermined if Justice goes on record with a contrary one. I think that a phone call to either George Phillips or Frank Hunger to explain our views would advance Defense's position. I would be happy to prepare talking points for such a phone call if you agree that it is called for.

Did you act on those recommendations?

Ms. GORELICK. Let me tell you precisely what I did, Senator. My view was that we ought to hear Justice's concerns, that I should not call the Department of Justice and say this is what the Defense Department wants. It was my view that we ought to listen to their perceptions of what the right qui tam legislation should be, and

that is what occurred. There was no phone call by me to Frank Hunger or to anyone, for that matter, at the Department of Justice on this issue. And, rather, the direction to my staff, which was followed, was to engage in a constructive discussion with the Department of Justice as to what the right *qui tam* legislation should be and what the right position should be for the Department of Defense and the Department of Justice and the administration, so that we had a good, strong bill, but one that does not undermine our voluntary disclosure program or create conflicts for particular personnel within the Department.

Unfortunately, this is a moving picture here. What happened thereafter was a very useful and constructive dialog between the Department of Defense and Department of Justice.

There is no formal position yet having been taken by the administration just because that process is in progress as we speak. So I might say to you that there is no—it would not be accurate, in my view, to say that industry has driven the Department of Defense's ultimate position here, nor would it be accurate to say that industry has driven or will drive the administration's position.

Senator GRASSLEY. My time is up, so let me ask a last question. Let me say that it is okay for you to say it, and I am sure that you say it with good reason, and maybe even strong belief about it. Obviously, after 10 years of my working in this area, I believe DOD very much drives it, and then that would bring me to my last question for you because I think the sad commentary about the Department of Defense driving this whole issue and, in a sense, forming the Government's position, all of the bureaucracy's position on it, is this is not just a defense issue anymore.

The biggest claim ever settled under *qui tam* was Medicare fraud, \$110 million in California last year. So it seems to me that we should not let the Defense Department drive this issue. With that in mind, my last question to you, the bottom-line question, is what assurances can you give me that the Government's position on *qui tam* will not just be decided by the Department of Defense, an agency that has a financial appetite that can't be satisfied, an agency whose contractor's can't be satisfied either, and probably the agency where the most wrong has been done.

Ms. GORELICK. Well, I agree with you completely on that perspective, that is that *qui tam* is much more likely in the future to be used in other areas, and I also agree with you, Senator, that we need to have a very strong *qui tam* program and that the voice of the Department of Justice should be heard amply on this issue.

I think you will find at the end of the day that there are remarkably few differences between this administration's position and certainly my personal position and yours, and I really look forward to working with you to what I do believe is a common goal.

Senator GRASSLEY. I want to thank you. I think you have been very forthcoming in your responses to me, and particularly in your cooperation for our receiving the material we needed to ask you these questions. Thank you.

Ms. GORELICK. Thank you, Senator.

The CHAIRMAN. Thank you, Senator.

Senator SPECTER?

Senator SPECTER. Thank you, Mr. Chairman.

The CHAIRMAN. Excuse me. You have been sitting there non-stop. Would you like to take a brief break, a 5-minute recess?

Ms. GORELICK. Let me just consult for just a moment.

[Pause.]

Ms. GORELICK. Senator, if you are willing to keep on going, I am. I am not drinking too much of this water here.

The CHAIRMAN. We get to get up and down. You have been sitting there straight.

Senator.

OPENING STATEMENT OF SENATOR SPECTER

Senator SPECTER. Thank you, Mr. Chairman. Ms. Gorelick, I appreciated your coming by yesterday to talk with me in advance. Some of the subjects that I want to cover with you we talked about informally, some we did not because our meeting was abbreviated so you could go see Senator Grassley. I am not sure you made a wise decision in doing that.

The first comment I want to make before moving to specifically two areas of questioning is my hope that you will focus on administrative matters to the extent of expediting the work of the Justice Department on critical appointments, such as the one of the Assistant Attorney General for the Civil Rights Division which has taken some 14 months. I think we are on the road finally to having an assistant attorney general, but it seems to me that that is an unacceptable delay, even with the problems which were faced on that line.

Another issue is the one of the Federal judgeships where there are so many vacancies. In raising that issue, I note the problems of the prior administrations which were Republican, and I had spoken out at that time. But there is an insufficient appreciation in Washington for the work which the Federal courts do, short of the Supreme Court.

If there is a Supreme Court nomination, there is a tremendous flurry of activity and excitement, but the district and appellate courts are enormously important as well. As a lawyer who practice, for a long time and still do a little, I would urge you to really focus in on that with a sense of urgency.

I would like to take up with you two substantive questions. One is on the question of career criminals and the second is on the question of delays in Federal appeals on State murder cases. I pick these two as areas where I think the Federal Government can have a very significant impact on street crime which is the responsibility largely of the State courts.

On the issue of career criminals, we have become embroiled in loud rhetoric on many levels from one end of Pennsylvania Avenue to the other. I think the rhetoric is more vacuous, at least more frequent, coming out of the Congress than it is out of the White House, but I think it is problematic at both ends because of the simple approach of three strikes, you're out.

You and I talked about this a bit yesterday. What I think needs to be done, and I would urge you to consider it, is to have some Federal leadership and funding on literacy training and job training in the State prisons so that when you have a career criminal who has had a chance for rehabilitation, the State court judges will

impose life sentences. It is no surprise when a functional illiterate comes out of jail without a trade or a skill that that functional illiterate returns to a life of crime.

I was a district attorney in Philadelphia for eight years and I tried to get judges to impose life sentences under habitual offender statutes for criminals who were career criminals and had committed three or more violent offenses. This just isn't possible unless there is some first-line effort for juveniles and first offenders and second offenders. If that is done, then I think you can get judges in State courts, where the vast majority of violent crime is handed, to impose life sentences.

But there is one other item which is necessary, and that is prison space. Judges in most States are reluctant to sentence, and we have developed this on the record in other hearings, where there is no space available. It is my thought that we ought to have an incentive for State court judges to impose life sentences for career criminals where they would be sentenced to Federal institutions.

In part, this is taken up by the regional prison concept which Senator Biden has advocated. My own view is that we need it more finally honed to career criminals so that there is the Federal leadership in getting them to serve life sentences, but that can only be done after that kind of rehabilitation has been attempted and they have failed at it.

The legislation has been pending for a long while and there has been very little involvement by the Justice Department, and this goes for the Reagan and Bush Justice Departments as well as for the Justice Department of the current administration. I would like to get a response from you as to what you think about that in general.

Ms. GORELICK. Well, I think that you and I can have a very fruitful dialog on this because I think we would see the issue similarly. I met with your former colleagues representing the State and local prosecutors and there is no group, I think, more aware of the limits of the criminal sanction to solve the crime problem alone than that group. They were very clear in the need to combine the tools for strong, effective, lengthy sentences with the need to address the prevention and rehabilitation issues, and I would very much like to work on this issue.

What you propose, Senator, is interesting in that it brings together the issue of sentencing, the issue of prison space and the issue of rehabilitation addressed to the career criminal, and I very much like the idea of a targeted program in that fashion so I would be very interested in working with you on that.

Senator SPECTER. Well, good. I am going to try to arrange an appointment with you in 90 days to see what progress you think can be made or has been made at Justice. I discussed this with Attorney General Reno and Deputy Attorney General Heymann and Associate Attorney General Hubbell, and I said to you yesterday the only time we can really attract the attention of you high-level executive department officials is right before confirmation. So I am going to call you for an appointment in 90 days.

The CHAIRMAN. It would be helpful if you would guarantee you will meet with the Senator between now and then.

Ms. GORELICK. He has already got that guarantee. I did meet with him yesterday.

The CHAIRMAN. Well, I can guarantee you you will get it if she says it.

Ms. GORELICK. He has got the guarantee, and I also told him—I gave you, Mr. Chairman, as a reference—I told him that you would tell him that I do respond to phone calls.

The CHAIRMAN. You do respond to phone calls.

Senator SPECTER. From whom, the Chairman?

Ms. GORELICK. Well, but you have never tried to call me.

The CHAIRMAN. She also demands that I respond to her phone calls, too.

Senator SPECTER. The other subject I want to discuss with you is the question of delays from habeas corpus in the Federal courts on death cases. I believe this to be a serious problem on law enforcement, because I am personally convinced that the death penalty is a deterrent. The vast majority, in fact, almost all of the death penalty cases are now in the State courts because there is only one penalty in the Federal court which calls for the death penalty.

The Federal courts are responsible for delays which go up to 17 years, and it is my opinion, after some experience in the field, that the failure to impose swift and certain punishment, starting with the death penalty, makes the criminal justice system a laughing-stock, because the criminals know that there is no enforcement.

The most visible line turns out to be the death penalty cases. So even though the Federal Government doesn't deal with many death cases, the delays on the imposition of the death penalty, I believe, have a very profound effect on the administration of justice in all the State criminal cases.

What I would commend to your attention is the variety of legislative proposals which are pending in the Congress. We skipped habeas corpus because it was too controversial. My amendment was taken up as a separate bill and was defeated through the brilliant oratory of the Chairman of the Judiciary Committee that he exercised in his party caucus. I heard some extraordinary oratory on the floor, but I heard it was even better in his party caucus where there was no right of reply.

The CHAIRMAN. Well, Democrats do speak up.

Senator SPECTER. The essence of what I would like to see is to have Federal jurisdiction on State death penalty cases as soon as there is an affirmance by the State supreme court. This would prevent multiple habeas corpus or collateral proceedings in the State courts and then multiple proceedings in the Federal courts.

Some of the cases last as long as 17 years and have as many as half a dozen or more State court proceedings and a half or dozen or more Federal court proceedings and numerous petitions to the Supreme Court of the United States for certiorari.

I believe we need to change the Federal standard and not insist that every issue be litigated in the State court. All that does is send it back to the State court where there is a tennis match, State to Federal courts, and meanwhile the sentence is not carried out. So the pending legislation which I have introduced would call for a full hearing on every issue in the Federal court, whether or not

it has been adjudicated in the State court, and then one appeal to the circuit court. If there are subsequent petitions, then there should be a gatekeeper of the court of appeals, which is an idea advanced by Judge Newman, Chief Judge of the Second Circuit.

The red light has come on now, so I am going to——

The CHAIRMAN. You keep going. Turn it off.

Senator SPECTER. Well, that is a nice invitation, but I will still be reasonably brief.

The thrust of this approach would be that the Federal courts would take up all the issue on one occasion. We have seen the Supreme Court of the United States, in a case called *Castille v. Peoples* which came out of Philadelphia, PA, and was not a death penalty case, remand this case to the Third Circuit, which had reversed the district court, which had ruled on whether the action by the Supreme Court of Pennsylvania was discretionary or not in denying a petition for allocatur.

Now, all of that is legalese and a jumble, but it was a sequence of procedural inanities, which I say respectfully, although I don't know if this will get to the Supreme Court. But I would commend that case to your reading, and I will send over the citation to you because the Justice Department could have real leadership in this issue.

When the Solicitor General petitions for cert on these cases and would seek to intervene, there is a very close look taken by the Supreme Court of the United States. But essentially it is a statutory matter where, again, the Justice Department can provide leadership because the Congress can decide where there is Federal jurisdiction so that we do not have to require that all State habeas corpus be terminated. The Congress can decide that the Federal courts will take up all the issues, whether they have been decided in the State courts or not. In addition to that, there is a time limit which has attached.

These two issues, Ms. Gorelick, dealing with career criminals and dealing with murder cases in the States, I think, could have a very, very profound effect on crime on the streets. We passed the armed career criminal bill in 1984 which has been a landmark aid to law enforcement being directed at street crime, robberies and burglaries. It has been heralded by the chief law enforcers as a very important tool. That is the kind of action which I think we could undertake and have a very profound effect without utilizing very much of the \$22 billion which we have in the current Senate crime bill. I would be interested in your thinking on that matter.

Ms. GORELICK. The alternative to habeas reform that you describe is not one that I am familiar with. I am familiar with the problem that you describe and I really applaud the effort of this committee to bring both finality and fairness to the habeas process.

I would like the opportunity to look at the alternative that you suggest and to try to understand the ways in which it would compare to the thrust of this committee's other action. It clearly is a problem. We must have finality and we must have fairness to criminal defendants, and those are the two problems that have plagued habeas and death penalty litigation for a long time.

Senator SPECTER. A final comment. Ms. Gorelick, I like your record, academically and professionally, and I am glad to see the

vigor and energy which you will bring to the position. I will repeat publicly the suggestion I made to you yesterday which I think Senator Biden will concur in; that is, with a young family, get home for dinner.

I was district attorney in Philadelphia, which was a very tough job with 30,000 cases a year. A job can't be any tougher than that. I think yours will be just tough, or maybe it will be tougher. I made it a point to be home at 7 o'clock every evening and if it was 7:01, as I told you yesterday, my wife and my two sons had started dinner. I would repeat that suggestion to you publicly, and I look forward to working with you. I think that from the comments which have been made here today, your confirmation is virtually assured.

Ms. GORELICK. Well, I thank you, Senator, and my family thanks you.

Senator SPECTER. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. It is unsolicited, Ms. Gorelick, but the Senator is right. I know you have worked incredibly long hours as a lawyer, but you know, being over at the Defense Department, that there are some people who have no place to go. You obviously do, and I would go. You can always come back.

Ms. GORELICK. Well, I appreciate that. I have found, Senator, among the many blessings of a family is that it keeps one's life and mind in balance.

The CHAIRMAN. Only if you pay attention to it, and I am sure you do.

Senator Grassley has additional questions, I am told. I am sure you share my view that we should get this tied up. Why don't we take a 5-minute recess. He should be back close to quarter of, and hopefully he will be able to complete those questions by 2 o'clock, if that is all right with you.

Ms. GORELICK. That would be perfect. Thank you, Senator.

The CHAIRMAN. We are going to recess for 5 minutes.

[Recess.]

The CHAIRMAN. The hearing will come to order, please. Welcome back, Ms. Gorelick.

Ms. GORELICK. Thank you.

The CHAIRMAN. The Senator from Iowa.

Senator GRASSLEY. Thank you for your patience for me to—I had a joint television program with Senator Harkin going back to our State and they wanted it to be balanced, and obviously I would have to be there to balance it.

Ms. GORELICK. I am not going to comment on that, sir. [Laughter.]

Senator GRASSLEY. No. Please don't, please don't. You want our two votes. [Laughter.]

Senator GRASSLEY. You know of my interest in the Glosson promotion and I, of course, appreciate your providing me information. I understand that you very much desire that that be discussed, or any questions that I might have, in private session. So I am not going to ask questions on that issue, but there is something in regard to access to information that I want to ask about that goes much more broadly than the Glosson case. That is just the most recent example of it.

In connection with the promotion, I sought access to an unredacted version of an IG report which the Armed Services Committee had already received. I am not on the Armed Services Committee. My request was refused by DOD on grounds that the IG report contained privileged material exempt from public disclosure under FOIA. The Air Force cited Justice Department analysis of FOIA as supporting their position.

In my years in the Senate, I have frequently had similar problems. Agencies routinely refuse to allow me and other Senators access to information on FOIA grounds even though I am always seeking the information in connection with my official duties as a Senator. They say only the relevant oversight committees can have unrestricted access.

This year when the Air Force rebuffed me, I finally looked into FOIA to see if it really said what the agencies claimed it said, and my opinion is it does not. FOIA contains numerous exemptions from disclosure, but FOIA and the Inspector General Act expressly deny agencies authority "to withhold information from Congress."

The Court of Appeals for the District of Columbia Circuit has ruled that this language extends to requests by individual members of Congress. It was in *Murphy v. Department of the Army*—that is a 1979 case—that the D.C. Circuit concluded that there is, "No basis in statute or in public policy distinguishing for FOIA purposes between a Congressional committee and a single member acting in an official capacity."

Despite what I think is clear authority, which is the law of the District of Columbia, and binding on all the agencies, the Justice Department has advised agencies to ignore *Murphy*. Now, that is not just this administration's Department of Justice. In its most recent analysis, and they entitled it, and it was in 1984, "FOIA Update," the Office of Privacy boldly asserted that *Murphy* was wrong decided and should not be considered the law. The opinion said, "There is just no getting around the fact that the *Murphy* opinion on its face is based entirely on an aberrational reading of FOIA".

Do you share my concern that the Justice Department is counseling agencies to ignore the law on congressional access to executive branch information?

Ms. GORELICK. Senator, the issue that you raise is not one that I have had really any exposure to. The Glosson matter, you know, but other people may not know, involves the issue of the status of retirement of a—

Senator GRASSLEY. Please understand my question is not related to Glosson.

Ms. GORELICK. I just wanted to explain why it is that it is a matter that I am constrained in speaking about on the public record.

Senator GRASSLEY. Okay.

Ms. GORELICK. It involves an inspector general's report that is covered by various regulations and my advice in that regard to the Secretary and the Deputy Secretary is at the core of privileged communications. I just wanted to make clear that the constraints on my dialog with you are purely legal ones not having anything to do with me.

Let me try to address your question. I was not asked for advice on this issue and have not developed any position on it in my role

as general counsel of the Defense Department. I do understand that the Attorney General has taken a very open approach to FOIA and this is an issue that I would be happy to look at, but it is not one on which I have any view or experience.

Senator GRASSLEY. Given the President's as well as the Attorney General's statements about the need for a more open FOIA policy, do you think it would be appropriate for the Department of Justice to then, based on what you have just said, revisit its consideration of the issue, and hopefully, I would suggest, adopt a position consistent with the law? I won't go into it, but I have got a long quote here from Murphy that I think is very binding.

Ms. GORELICK. Again, this is not an issue on which I have any view, which means I have an open mind.

Senator GRASSLEY. By the way, the Carter administration, as well as the Reagan administration, as well as the Bush administration, attempted to ignore Murphy, and even in that 1980 update—I quoted from a 1984 update, but there was a 1980 update and that came after Murphy, not far after Murphy.

I appreciate your candid discussion with me about qui tam. I would like to discuss another issue that is somewhat connected with qui tam. On Monday, Associate General Hubbell resigned because of an apparent disagreement with his prior law firm. The conflict centered on billing practices. Newsweek reported that Mr. Hubbell may have over-billed the government while suing the accountants of Madison Guarantee Savings and Loan.

If the RTC or the FDIC was over-billed—I say if they were over-billed—I think it would amount to a false claim. Would you suggest the same thing, or would you agree?

Ms. GORELICK. I just don't know. I don't know enough about the facts of the case and how such billings translate into legitimate claims.

Senator GRASSLEY. That is probably legitimate. Let me go on, then. I would like to talk about, then, the potential problem of over-billing. How would such an issue be investigated. Would the government agency initially looking at the matter do it?

Ms. GORELICK. Presumably, and again it is a presumption on my part because I do not know, the administrative agency with responsibility would make an initial inquiry and determine what, in its view, should occur and whether further action by the Department of Justice is appropriate, in its view. But, again, that is a guess.

Senator GRASSLEY. If the RTC or the FDIC found sufficient evidence of over-billing, would it be referred to the Department of Justice, or in this case, because it may involve Whitewater matters, to Special Counsel Fiske?

Ms. GORELICK. That would depend on the facts of the matter and I just don't have any view on it.

Senator GRASSLEY. I have already had some connection with this. I have looked into it and have not been able to, of course, get an answer. And maybe I shouldn't expect you to answer in this environment, but the FBI advised me that the over-billing matter is within the jurisdiction of the special counsel. When a member of my staff contacted Mr. Fiske's office, staff was told that it may very well be within the general jurisdiction of the Department of Justice.

I guess all I can say at this point is I would appreciate your looking into the matter, and I will say this for my part: If there was over-billing of the government by the Rose law firm, then it means the taxpayers were defrauded. I think it is important that there be an investigation of this billing of government clients, and so I would like to have you look into it. I think it also points up the need for a strong False Claims Act. Unfortunately, the government doesn't always pursue fraud cases as vigilantly as it should, and although there may be no whistleblower in this particular instance, whistleblowers perform an important public service in protecting the public fisc. So it is only that I would like to have you look into it.

Ms. GORELICK. I understand your views and concerns. I don't know what it would be appropriate for me to commit to, and if you permit, I would like to demure on making any commitment at this time inasmuch as I do not know the contours of the issue.

Senator GRASSLEY. Well, that, that is okay. I guess, as time goes on, expect me to bother you about it again.

Ms. GORELICK. I have no doubt that any concern that you might have on your mind you would bring to my attention and I have no doubt that we would have a fruitful dialog about it.

Senator GRASSLEY. When Janet Reno came before the committee for confirmation hearings last year, I asked her questions regarding White House or other outside involvement with politically sensitive prosecutions, particularly those involving Members of Congress. I asked her about meetings between White House officials and the Justice Department regarding the way those investigations ought to proceed, and I asked the Attorney General what she would do if the White House wanted a heads-up on whether a particular person would be indicted. So I would like to ask you as a nominee for the second highest position at the Department some of the same kinds of questions concerning political interference in criminal prosecutions that I asked her.

Have you at any time had any conversations with the President, the First Lady or anyone currently or formerly at the White House, or on their behalf, with respect to Madison Guarantee, Whitewater, James McDougal, David Hale, the Rose law firm or any of its current or former partners?

Ms. GORELICK. No.

Senator GRASSLEY. Have you had any conversations with anyone now or formerly at the Department of Justice with respect to the those same matters?

Ms. GORELICK. No.

Senator GRASSLEY. Have you had any conversations with anyone at the Treasury Department or RTC with respect to those same matters?

Ms. GORELICK. No.

Senator GRASSLEY. What would you do if someone at the White House inquired of you the status of a pending criminal investigation or prosecution?

Ms. GORELICK. As I indicated earlier, one of the key responsibilities of a senior official at the Department of Justice is to insulate from political influence the decisions of line prosecutors and of supervisory personnel, and I would consider it to be one of my strong-

est requirements. There are procedures set out in communications between the Department of Justice and this committee laying out the process for and constraints on those communications and I would certainly follow those.

Senator GRASSLEY. It has been widely reported that the RTC made several criminal referrals to the Justice Department relating to Madison Guarantee. My memory is that there were at least three inquiries. First, the U.S. Attorney's office in Little Rock determined that there was no impediment to handling the inquiry, but later, without any apparent change in circumstances that would normally lead one to recuse themselves in the first instance, the U.S. Attorney concluded that she should recuse herself from further involvement with the referrals.

If you are confirmed, I would like your assurance that you will look into how the Justice Department and the U.S. Attorneys' offices handle these matters and at a subsequent date give this committee your view about how these matters were handled and how they should have been handled. Would you do that?

Ms. GORELICK. Again, on this question, as on the prior ones, I have absolutely no knowledge of the matter, nor do I know whether I, if confirmed, would be at liberty to make such a report. I don't even know what the procedure would be. I can give you my assurance that if—on ethical conduct, if there is credible information of unethical conduct with regard to someone over whom I have supervision, I would take all appropriate steps to ensure that that conduct is investigated.

With regard to a particular case, I just don't know the facts and I also don't know, in particular, the process. So I am leery of making a commitment, and what I would suggest in lieu thereof is for us to have a future discussion, if I am confirmed, on this issue so that you can be satisfied with respect to your concerns.

Senator GRASSLEY. I have some questions—and this will be my last set of questions, Mr. Chairman—that involve the vetting process. It is my understanding that you assisted the Attorney General and also Zoe Baird in preparing for their confirmation hearings. Were you involved on behalf of the administration in vetting either of these individuals?

Ms. GORELICK. No.

Senator GRASSLEY. You were not?

Ms. GORELICK. I was not.

Senator GRASSLEY. Have you assisted this administration in vetting any prospective employees for public office?

Ms. GORELICK. Yes.

Senator GRASSLEY. Did you do this before or after you became the general counsel at DOD?

Ms. GORELICK. Before.

Senator GRASSLEY. Could you share with us who you helped with?

Ms. GORELICK. Yes. I was a member of the vetting team that looked into now Secretary of Commerce Ron Brown's background before he was nominated.

Senator GRASSLEY. What is your understanding of the vetting process both before a nominee is actually selected and during the

confirmation process? In other words, just generally, how does it work?

Ms. GORELICK. Well, in the period before the administration took office, the then-President-elect asked that prospective nominees for Cabinet-level positions—and there were many of them; there were often three or four or five for each possible position—be subject to a background review by a group of lawyers working in the transition team and I participated in that process. It was as thorough as one can make it without having access to the vehicles of government by which perhaps a more effective background investigation can be done and in light of the time constraints. But it was, I thought, a pretty—from the perspective I had and the one that I did, I thought it was a reasonably thorough process.

My knowledge with respect to the vetting process now is that it is undertaken largely by the White House counsel's office and I do not know the contours or details of that process.

Senator GRASSLEY. Thank you very much.

Ms. GORELICK. Thank you, Senator.

The CHAIRMAN. Well, thank you very much, Senator, for your cooperation, and I thank you, Ms. Gorelick, for your cooperation and stamina.

Ms. GORELICK. Thank you, Senator.

The CHAIRMAN. My colleagues on both sides of the aisle once again, I think, have conducted themselves in a way that is appropriate. They have asked you a lot of difficult questions and you have answered them all candidly. Speaking of the vetting process, one of the parts of the ultimate vetting process is the confirmation process, and I think that everyone should learn a little bit of a lesson from your participation in the process.

Ms. GORELICK. Thank you.

The CHAIRMAN. Everything that was asked of you and all the records that were asked of you, you cooperated. It is a much, much easier way to go, and I think you have seen the results of that. Senator Grassley has been steadfast in his attempt—and I happen to share his view generally on *qui tam*—he has been steadfast in his efforts to get records and background on a number of these issues and for a number of not only nominees, but administrations, they have been less than cooperative with his efforts. I am confident one of the reasons why he has taken the position he has is because you have cooperated with him.

I look forward, and I mean this sincerely, I truly look forward to working with you. It is a time for the Attorney General's office generally where they need a bit of a lift. The morale, I expect, at the moment is not as high as it can and should be. I happen to have a very high regard for Web Hubbell. I think he did a hell of a job up here. I know nothing about his personal circumstance relative to his old law firm.

But I also know you, and I know not only your capabilities as an attorney, but your capabilities as one who gets things done and your willingness and ability to cooperate. You know this place; you know your way around this town. That is important for your job, and I think we are all going to be very well served having you there.

For the record, I made reference at the beginning that I have called on your legal services. I wanted the record to show, so I have full disclosure at this end, that when there was the investigation that we in the Senate voted ourselves in the Senate to investigate the issue of whether or not and who may have leaked the information about the Anita Hill statement from the committee—and there was an investigation which was conducted in most part under oath where the outside counsel which the Senate hired came in and spoke to all of us on this committee, and ultimately wrote a report that was very complimentary to the committee and the committee membership. I sought counsel and the counsel I sought was you, and I did not regret it then and I do not regret now that the Attorney General and the entire Department will have the benefit of your counsel.

Ms. GORELICK. Thank you very much, Senator. I appreciate it.

The CHAIRMAN. So I look forward to working with you, Jamie. I think you will be a great addition, and hopefully we will be able to move quickly to—and I realize you not filling Web Hubbell's position; you are filling the position left vacant by a man who is now back teaching, and a great teacher he is. Hopefully, we can move very quickly on a nominee to replace Mr. Hubbell as well because you heard a number of things here today; several are very bipartisan in their nature.

We must move more quickly on Federal judges. We must, in my view, move more quickly on filling the vacancies that continue to exist in the Department, and it seems to me it would be very important for you—I wasn't attempting to be overly critical of your predecessor. I think he is a fine man, but I think that you understand that it is important for you to be involved not just down in the Justice Department, but, for the things that the President and the Attorney General are supporting, to be involved up here. You are very good at it.

Ms. GORELICK. Thank you.

The CHAIRMAN. I hope they will use you. I hope you will be willing to weigh in where the matter is important to the Attorney General and the President because, quite frankly, on policy matters where the administration does not weigh in, the message that is communicated is they don't care that much about it, and I know that not to be the case particularly on passage of the so-called Biden-Reno crime bill, the underlying bill that we have here.

The President has personally called me half a dozen times before I introduced the bill pleading with me to get moving on it. The Attorney General did go over every single solitary line of that bill and signed on to it, and it is very important, in my view, that there be no equivocation on the part of the administration with the House of Representatives, recognizing their independence and that they can do what they want with it, but that they know what the administration wants.

So I look forward to working with you. I thank you. I thank your niece for being so patient. She came all the way from California for this hearing and she is going to ask you the first thing, do those guys and women always keep you going so you don't have lunch until 2:20. We don't always do it. And I thank your husband and

your brother and your sister-in-law and everyone for being here.
You have been a very good witness and gracious, as always.

We are adjourned.

[Whereupon, at 2:20 p.m., the committee was adjourned.]

SUBMISSIONS FOR THE RECORD

I. BIOGRAPHICAL INFORMATION (PUBLIC)

Full name (include any former names used.)

Jamie Shona Gorelick

Address: List current place of residence and office address(es).

Home: 3713 Williams Lane
Chevy Chase, Md. 20815

Office: Office of General Counsel
Department of Defense
The Pentagon
Washington, D.C. 20301-1600

Date and place of birth.

May 6, 1950; New York, New York

Marital Status: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Married to Richard E. Waldhorn

Occupation: Physician
Title: Acting Chief, Division of Pulmonary and
Critical Care Medicine
Employer: Georgetown University Hospital
3800 Reservoir Road, N.W.
Washington, D.C. 20007

Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

College: Radcliffe College, Harvard University
September 1968 to June 1972
B.A. magna cum laude, June 1972

Law School: Harvard Law School
September 1972 to June 1975
J.D. cum laude, June 1975

6. Employment Record: List (by year) all business or professional corporation, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

1993 - Present U.S. Department of Defense
General Counsel

1975 - 1979 Miller, Cassidy Larroca & Lewin
1980 - 1993 (Associate, then partner)

1979 - 1980 U.S. Department of Energy
Assistant to the Secretary and
Counsellor to the Deputy Secretary

1979 - 1980 U.S. Department of Defense
Vice-Chair, Task Force on the Evaluation of
the Audit, Investigative and Inspection
Components of the Department of Defense

1975 Department of Government
Harvard University
(teaching fellow)

1974 Williams & Connolly
(summer associate)

1973 - 1974 Professor Alan Dershowitz
Harvard Law School
(research assistant)

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No military service.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Radcliffe Orator, 1972

Department of Energy Exceptional Service Award, 1979

Secretary of Energy's Outstanding Service Medal, 1980

Women's Bar Association Woman Lawyer of the Year, 1993

Member, American Law Institute

Fellow, American Bar Foundation

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

District of Columbia Bar

President (1992-1993); President-Elect (1991-1992); Secretary (1981-1982); Board of Governors (1982-1988); Executive Committee (1984-1988); Special Committee on the Model Rules of Professional Conduct (1981-1990); Legal Ethics Committee (1978-1981); Committee on Voluntary Arbitration (1985-1987); Committee on Multi-Door Dispute Resolution (1985-1987); and other committees.

Advisory Board, District of Columbia Bar Foundation

American Bar Association

Member, House of Delegates (1992-1993)

Member, Committee on Credentials and Admissions
(1992 - 1993)

Council Member and Secretary, Section of Litigation
(1988-1993)

Chair, Committee on Complex Crimes Litigation
(1984-1987); Division Director (1987-1988);
Representative, Criminal Justice in a Free Society
Project

Member, Standing Committee on Professional Discipline
(1987-1991)

Section on Individual Rights and Responsibilities

Advisory Group to the Bar Information Program, Standing
Committee on Legal Aid and Indigent Defendants

Fellow, American Bar Foundation

~~Board of~~ Directors, National Women's Law Center (1989-1993)

Board of Directors, Bazelon Center for Mental Health Law
(1991-1993)

~~Board of~~ Directors, Foundation for Change (1989-1991)

Brookings Institution Task Force on Civil Justice Reform

Washington Legal Clinic for the Homeless, Advisory Board to
Home Court (1989-1991)

American Law Institute (1987-)

United States District Court for the District of Columbia
Committee on Grievances (1991-1993)

Judicial Conferences of the U.S. Court of Appeals for the
District of Columbia Circuit (1982-1990, 1992); United
States Court of Appeals for the Federal Circuit (1985-1991);
District of Columbia Court of Appeals (1981-1988, 1992)

Member, Women's Bar Association of the District of Columbia;
Federal Bar Association; District of Columbia Bar
Association; Washington Bar Association; Hispanic Bar
Association

10. Other Memberships: List all organizations to which you
belong that are active in lobbying before public bodies.
Please list all other organizations to which you belong.

Women's Forum

11. Court Admission: List all courts in which you have been
admitted to practice, with dates of admission and lapses if
any such memberships lapsed. Please explain the reason for
any lapse of membership. Give the same information for
administrative bodies which require special admission to
practice.

<u>Court</u>	<u>Admission Date</u>
United States Supreme Court	07/10/79
District of Columbia Court of Appeals	11/25/75
United States Court of Appeals for the District of Columbia Circuit	07/21/76

United States Court of Appeals for the Second Circuit	06/04/86
United States Court of Appeals for the Third Circuit	10/20/88
United States Court of Appeals for the Fourth Circuit	04/30/86
United States Court of Appeals for the Fifth Circuit	08/15/77
United States Court of Appeals for the Federal Circuit	10/01/82
United States District Court for the District of Columbia	01/05/76
United States District Court for the District of Maryland	10/18/85
United States Court of International Trade	03/08/84
United States Court of Federal Claims	07/21/76
United States Tax Court	03/26/76
United States Court of Military Appeals	03/25/93

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Destruction of Evidence (with Marzen, S. and Solum, J.)
(Wiley & Co. 1989)

"The Interview Process," in Internal Corporate Investigations (ABA Press, 1992)

"Restrictions on the Release of Government Information," 20 Public Contract Law Journal 427 (1991) (with Enzinna, P.)

"Recognizing Conflicts of Interest," 36 The Practical Lawyer 71 (1990)

"Effective Representation of the Corporation, Its Directors, Officers, and Employees in Grand Jury and Agency Investigations," in The Corporate Litigator (ABA Press, 1989)

"Parallel Importation After K-Mart v. Cartier ("COPIAT")," 70 Journal of Patent and Trademark Office Society 696 (1988)

"Offense Conduct Issues in White-Collar Sentencing," 2 White Collar Crime Reporter No. 3, p.1 (March 1988) and Readings in White-Collar Crime (Lichtenberger, ed.; Meckler 1991)

"Structuring the Internal Investigation When a Corporation Is Faced with Parallel Civil, Criminal and Administrative Proceedings," 3 Corporate Counsel's Quarterly No. 4, p. 1 (Oct. 1987)

"Fighting Government Obstruction of Access to Witnesses," 1 Corporate Criminal Liability Reporter No. 4, p. 19 (Fall 1987)

"The Case for Parallel Importation," 11 North Carolina Journal of International Law and Commercial Regulation 205 (1986) (with Little, R.)

Opinion ("A Post-Sedima Update on Establishing Damages in RICO Actions"), 4 RICO Law Reporter No. 2, p. 204 (1986)

"The Measure of Damages in RICO Actions," in RICO, The Second Stage (ABA Press, 1985)

"Establishing Damages in RICO Actions," 1 RICO Law Reporter 575 (1985)

"Grand Jury Representation: A Primer on Pre-Indictment Litigation," 20 Trial No. 10, p. 20 (Oct. 1984) (with Braga, S.)

"The Attorney's Duty to Take Contempt," Legal Times of Washington (1978) (with Miller, H.J., Jr.)

"Parole Guidelines Confuse Sentencing Process," 1 Legal Times of Washington, No. 13, p. 9 (August 28, 1978) (with Miller, H.J., Jr.)

"~~Pretrial Diversion: The Threat of Expanding Social Control,~~" 10 Harvard Civil Rights-Civil Liberties Law Review 180 (1975)

13. Health: What is the present state of your health? List the date of your last physical examination.

Good health.

Last check-up: December 23, 1993

14. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

1979: Vice-Chair (appointed)
Task Force on Evaluation of the Audit,
Inspection and Investigative Components of
the Department of Defense
U.S. Department of Defense

1979-80: Assistant to the Secretary and Counsellor to
the Deputy Secretary (appointed)
U.S. Department of Energy

1993-94: General Counsel (appointed)
U.S. Department of Defense

15. Legal Career:

- a. Describe chronologically your law practice and experience after graduation from law school including:
1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;
 2. whether you practiced alone, and if so, the addresses and dates;

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

June 1975 - August 1979

Associate
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W.
Washington, D.C. 20037

I began practicing law in a then nine-person firm with a varied litigation practice. Most of the clients on whose matters I assisted were individuals or small corporations. The work was about equally divided between civil and criminal work and ranged from preparation for and participation in civil and criminal trials to appellate briefing and assisting in appellate arguments.

January 1979 - August 1979

Vice-Chair
Task Force on Evaluation of the Audit, Inspection and Investigative Components of the Department of Defense
U.S. Department of Defense

As a member of this Task Force, I worked as a part-time special governmental employee on an assessment of the capabilities and organizational structure of the various audit, inspection and investigative components of the Department of Defense.

August 1979 - January 1980

Assistant to the Secretary and Counsellor to the Deputy Secretary
U.S. Department of Energy

After assisting the incoming Secretary of Energy with his transition, I worked for several months to help him organize his Office and particularly to assist the new Deputy Secretary on his confirmation and with his first few months in office.

January 1980 - January 1981

Associate
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W.
Washington, D.C. 20037

I returned to private practice and assumed more of a managerial role with respect to cases of the same variety as in my earlier practice.

January 1981 - April 1993

Partner
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W.
Washington, D.C. 20037

As a partner over a period of twelve years, I took on increasing responsibility and was retained on matters focusing on civil litigation, corporate internal investigations, parallel civil and criminal proceedings, and legal ethics and professional responsibility. I continued my commitment to pro bono work and to community activity.

May 1993 - Present

General Counsel
U.S. Department of Defense

As General Counsel of the Department of Defense, I oversee lawyers engaged in a wide variety of legal issues involving intelligence, investigations, the prosecution and defense of military justice cases, personnel policy, procurement law, the environment, international agreements, etc.

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed of the years?

As noted above, I had a widely varied litigation practice, involving civil, criminal and appellate work; discovery and motions practice; and grand jury and administrative representations. The character of the practice changed depending on the particular mix of cases at any particular time.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

The typical client also varied over the years. In my early years of private practice, most of the clients for whom I worked were individuals or small corporations. In later years, while I continued to represent individuals, my practice broadened to include large corporations and non-profit organizations.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Court appearances were occasional, the frequency varying with the particular mix of cases at a given time. I have been involved in litigation in the Supreme Court, many of the courts of appeals, several district courts and the District of Columbia courts. Several matters were handled on appeal only or involved administrative proceedings and their appeal.

2. What percentage of these appearances was in

(a) federal courts;

85%

(b) state court of record;

10%

(c) other courts.

5% (including arbitration ancillary to court proceedings)

3. What percentage of your litigation was:

(a) civil

60%

(b) criminal

40%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I participated in the trial to verdict or judgment of nine cases, three as chief counsel and six as associate counsel.

5. What percentage of these trials was:

- (a) jury;
- (b) non-jury.

Of these, two were jury and seven were non-jury.

16. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. K-Mart Corp. v. Cartier, Inc., et al., 486 U.S. 281 (1988)

K-Mart Corp. v. Cartier, Inc., et al., 485 U.S. 176 (1988)

Weil Ceramics & Glass, Inc. v. Dash et al., 878 F.2d 659 (3d Cir. 1989)

Olympus Corp. v. United States, 792 F.2d 315 (2d Cir. 1986)

Coalition to Preserve the Integrity of American Trademarks, et al. v. United States, et al., 790 F.2d 903 (D.C. Cir. 1986)

Vivitar Corp. v. United States, et al., 761 F.2d 1552 (Fed. Cir. 1985)

Coalition to Preserve the Integrity of American Trademarks, et al. v. United States, et al., 598 F. Supp. 844 (D.D.C. 1984)

Vivitar Corp. v. United States, et al., 593 F. Supp. 420 (Ct. Int'l Trade 1984)

Vivitar Corp. v. United States, et al., 585 F. Supp. 1415 (Ct. Int'l Trade 1984)

With others at Miller, Cassidy, Larroca & Lewin, I represented 47th Street Photo, a discount retailer of consumer electronics, photographic equipment and computers, in litigation concerning the right of discount retailers to buy legitimately trademarked goods abroad and import them for sale in this country. Along with other discount retailers and importers, 47th Street intervened in both private suits and suits against the United States government (whose regulations permitted the discount retailers' overseas purchase and importation of legitimately trademarked goods). A coalition of U.S. trademark holders — mostly U.S. subsidiaries of foreign manufacturers — argued that the U.S. trademark should entitle the holder to exclude from the United States goods bearing the trademark that were introduced into commerce abroad.

These cases were litigated through the federal trial courts, the Courts of Appeals for the Federal Circuit, District of Columbia Circuit and Third Circuit, and the United States Supreme Court. I was involved in the development of legal strategy, factual development, the drafting of briefs and oral argument. The litigation lasted from 1984 through 1988, when the Supreme Court sustained the position pressed by 47th Street and the other discount retailers.

(a) 1984-1988

(b) United States Court of Appeals for the Second Circuit: Hon. James L. Oakes, Hon. Ralph K. Winter, Hon. George C. Pratt

United States Court of Appeals for the District of Columbia Circuit: Hon. Abner J. Mikva, Hon. Robert Bork, Hon. Laurence H. Silberman

United States Court of Appeals for the Third Circuit: Hon. A. Leon Higginbotham, Jr., Hon. Edward R. Becker, Hon. Edward Dumbauld (by designation)

United States Court of Appeals for the Federal Circuit: Hon. Howard T. Markey, Hon. Giles S. Rich, Hon. Helen W. Nies, Hon. Oscar H. Davis, Hon. Jean Galloway Bissell

United States District Court for the District of Columbia: Hon. Norma Holloway Johnson

United States Court of International Trade: Hon. Jane A. Restani

(c) Co-counsel:

Nathan Lewin
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20036
(Counsel for 47th Street Photo, Inc.)

Counsel for Other parties (partial list per instructions of Committee staff):

William H. Allen
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 662-6000
(Counsel for Coalition to Preserve the Integrity of American Trademarks, et al.)

Velta A. Melnbrencis
Alfonso Robles
U.S. DEPARTMENT OF JUSTICE
Washington, D.C. 20530
(202) 514-2000
(counsel for United States)

2. National Association of Broadcasters, et al. v. Copyright Royalty Tribunal, 675 F.2d 367 (1982)

2. National Association of Broadcasters, et al. v. Copyright Royalty Tribunal, 675 F.2d 367 (1982)
- Christian Broadcasting Network, Inc. v. Copyright Royalty Tribunal, 720 F.2d 1295 (D.C. Cir. 1983)
- National Association of Broadcasters v. Copyright Royalty Tribunal, 772 F.2d 922 (D.C. Cir. 1985)
- National Association of Broadcasters v. Copyright Royalty Tribunal, 809 F.2d 172 (2d Cir. 1986)

From 1981 until 1993, I represented National Public Radio and its member stations as claimants before the Copyright Royalty Tribunal -- which is responsible for the division of royalty fees paid by cable systems for a compulsory license entitling them to retransmit broadcast television and radio signals -- and on appeal from the decisions of the Tribunal. This representation began after the first decision of the Tribunal, in which a tentative determination to make an award to National Public Radio from the 1979 Cable Royalty Fund was reversed without notice by the Tribunal, resulting in no compensation to public radio for the retransmission of its programming.

On appeal, the Court of Appeals for the District of Columbia Circuit reversed and remanded for further proceedings as to National Public Radio. Though this remand did not result in an award from the 1979 Cable Royalty Fund, the then-ongoing proceeding to divide the 1980 Cable Royalty Fund did and that result was upheld on appeal. For each of the succeeding annual proceedings, I represented National Public Radio and its member stations in the litigation or settlement of these claims. I presented evidence and argument before the Tribunal and briefed and argued before the Court of Appeals.

(a) 1981-1993

- (b) United States Court of Appeals for the Second Circuit: Hon. J. Edward Lumbard, Hon. Ralph K. Winter, Hon. J. Daniel Mahoney, Hon. Jose A. Cabranes (by designation)

United States Court of Appeals for the District of Columbia Circuit: Hon. George E. MacKinnon, Hon. Abner J. Mikva, Hon. Spottswood W. Robinson, III,

(c) Co-Counsel:

Nathan Lewin
 MILLER, CASSIDY, LARROCA & LEWIN
 2555 M Street, N.W.
 Washington, D.C. 20037
 (202) 293-6400
 (Counsel for National Public Radio)

Lois J. Schiffer
 U.S. DEPARTMENT OF JUSTICE
 Washington, D.C. 20530
 (202) 514-2000
 (Counsel for National Public Radio)

Counsel for Other Parties (partial list, per
 instruction of Committee staff):

Fred I. Koenigsberg
 WHITE & CASE
 1155 Avenue of the Americas
 New York City, New York
 (212) 819-8200
 (Counsel for American Society of Composers,
 Authors and Publishers)

John F. Cordes
 Bruce G. Forrest
 William G. Cole
 Irene M. Solet
 U. S. DEPARTMENT OF JUSTICE
 Washington, D.C. 20530
 (202) 514-2000
 (Counsel for Copyright Royalty Tribunal)

Dennis Lane
 HOLLAND & KNIGHT
 888 17th Street, N.W.
 Washington D.C. 20006
 (202) 955-5550
 (Counsel for Motion Picture Association of
 American, Inc.)

John I. Stewart, Jr.
 CROWELL & MORNING
 1001 Pennsylvania Avenue, N.W.
 Washington, D.C. 20023
 (202) 624-2500
 (Counsel for National Association of Broadcasters)

Robert Alan Garrett
 ARNOLD & PORTER
 Thurmond Arnold Building
 1200 New Hampshire Avenue, N.W.
 Washington, D.C. 20036-6885
 (Counsel for Major League Baseball)

3. United States v. Stuart E. Berlin, et al., 707 F. Supp. 832 (E.D.Va. 1989)

In 1988 and 1989, I represented Dale Schnittjer, the chief financial officer of Teledyne Electronics, a defense contractor that was indicted in the "Ill Wind" prosecutions, in which allegations of bribery of government officials and misuse of government information were made against many defense contractors, their employees and consultants. Mr. Schnittjer was indicted along with the company, its consultant, two other company employees and a government official. Before trial in the Eastern District of Virginia, the company, the consultant and the government official pled guilty. The case proceeded to trial against the three company employees. Working with one of my partners, who took the lead at trial, I developed legal strategy, oversaw legal research, prepared witnesses, presented argument on motions and contributed to the presentation at trial, which resulted in the acquittal of Mr. Schnittjer. (The other defendants were convicted.)

(a) 1988-1989

(b) United States District Court for the Eastern District of Virginia: Hon. Richard L. Williams

(c) Co-counsel:

R. Stan Mortensen
 MILLER, CASSIDY, LARROCA & LEWIN
 2555 M Street, N.W.
 Washington, D.C. 20037
 (202) 293-6400

Counsel for Other Parties (partial list, per instructions of Committee staff):

Thomas Patten
 LATHAM & WATKINS
 Suite 1300
 1001 Pennsylvania Avenue, N.W.
 Washington, D.C. 20004
 (202) 637-2200
 (Counsel for Teledyne Corp.)

Mark H. Tuohey
 (Formerly with PIERSON, BALL & DOWD)
 REED, SMITH, SHAW & MCCLAY
 1200 18th Street, N.W.
 Washington, D.C. 20036
 (202) 457-6100
 (Counsel for George Kaub)

Joseph Aronica
 Jack Hanly
 Assistant United States Attorneys for the
 Eastern District of Virginia
 1101 King Street, Suite 502
 Alexandria, Virginia
 (703) 706-3700
 (Counsel for United States)

4. Mendaro v. World Bank, 717 F.2d 610 (D.C. Cir. 1983)

In 1983, on behalf of the Women's Legal Defense Fund, I represented Susana Mendaro, who had been a consultant economist with the World Bank, in her appeal from a judgment of the district court holding that the World Bank, as an international organization, was immune from suit under Title VII for sex discrimination and sexual harassment. Working with an associate in the firm, I crafted the legal argument and argued — unsuccessfully — before the Court of Appeals that on light of the specific provisions of the World Bank's Articles of Agreements, the International Organizations Immunities Act should not apply to bar suit in the circumstances of this case. Having prevailed, the Bank proceeded to establish a Tribunal for the disposition of such claims.

(a) 1992-1993

(b) United States Court of Appeals, District of Columbia Circuit: Hon. Spottswood W. Robinson, III, Hon. Malcom Richard Wilkey, Hon. Howard T. Markey (by designation)

(c) John H. Pickering
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000
(Counsel for World Bank)

5. Umana v. Swidler & Berlin Chartered, et al., No. 89 CA 012531 (Super. Ct., D.C. 1992), on appeal, 92-CV-1088 (D.C. Ct. App.)

From 1991 to 1993, I represented the firm of Swidler & Berlin, which had been sued by a former colleague, John Umana, who alleged that he had been improperly removed as a partner in the firm. We successfully moved to compel arbitration, pursuant to an earlier agreement between the parties, and tried the case before a panel of arbitrators. The resulting finding for the defendant was confirmed by the Superior Court and is now on appeal before the District of Columbia Court of Appeals. I was lead counsel in the matter, including the arbitration, working with another partner in the firm.

(a) 1991-1993

(b) Superior Court of the District of Columbia: Hon. Steffan W. Graae

Arbitral Panel:

Robert Pitofsky, Esq.
ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-8358

Jules Bernstein, Esq.
BERNSTEIN & LIPSETT
1920 L Street, N.W.
Suite 602
Washington, D.C. 20036
(202) 296-7222

James Robertson, Esq.
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6167

(c) Co-Counsel:

Scott L. Nelson
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Counsel for other parties:

Jacob A. Stein
STEIN, MEZZINES & MITCHELL
1100 Connecticut Avenue, N.W.
Washington, D.C.
(202) 737-7777
(Counsel for John Umana)

6. United States v. Deak-Perera & Co., 566 F. Supp. 1398
(D.D.C. 1983)

This was an action by the Internal Revenue Service ("IRS") to enforce a third-party summons on a company that, inter alia, bought and sold foreign currency and precious metals. The company's records were subject to review by the Secretary of the Treasury under the Currency and Foreign Transactions Reporting Act to ensure that it was complying with the Act. The Secretary of the Treasury assigned audit responsibility to various other agencies, including the IRS. Despite assurances by the IRS that it would not use information obtained in this compliance audit for other purposes, it sent information on customer transactions to its field offices, one of which used that information as the basis for a summons to the company for information to use in an audit of the customer's income tax liability. On the basis of this record, the District Court declined to enforce the subpoena. I handled the discovery and legal briefs in this matter.

(a) 1983

(b) United States District Court for the District of Columbia: Hon. Thomas Penfield Jackson

(c) Counsel for Other Parties:

Gregory S. Hrebinak
U.S. DEPARTMENT OF JUSTICE
Washington, D.C. 20530
(202) 514-2000
(Counsel for United States)

7. In re Sealed Motion, 880 F.2d 1367 (D.C. Cir. 1989)

I represented a former career Department of Justice employee in the Independent Counsel's inquiry into certain actions taken by Theodore Olson when he was Assistant Attorney General, Office of Legal Counsel, in responding to congressional requests for information. At the close of the investigation, in which no one was charged, Independent Counsel prepared a report and, by statute, was required to provide individuals named in the report with an opportunity to submit comments for inclusion with the report. To prepare such comments, we sought the grand jury testimony that had been given by the former Department employee, a request resisted by the Independent Counsel. The Court ordered the transcript produced. I was assisted in this matter by another lawyer in the firm.

(a) 1987-1989

(b) Hon. George E. MacKinnon, Hon. John D. Butzner, Jr., and Hon. Wilbur F. Pell

(c) Co-counsel:

Niki Kuckes
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Independent Counsel:

Alexia Morrison
SWIDLER & BERLIN
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007
(202) 424-7500

8. Hatzlachh Supply Co. v. United States, 444 U.S. 460 (1980)

This case involved goods seized by the U.S. Customs Service due to inadequate documentation and later returned upon payment of a penalty. While in the custody of the Customs Service, the goods were pilfered, and the value upon their return was substantially diminished. At issue in the case was whether under these circumstances the United States could be sued. The Supreme Court held that a bar to such an action under the Federal Tort Claims Act did not preclude suit under the Tucker Act for breach of an implied contract of bailment. I was responsible for preparing the petition for writ of certiorari and the briefs. The case was argued by another lawyer in the firm, as I was serving in Department of Energy when the matter was set for argument.

- (a) 1977-1980
- (b) Justices of the Supreme Court
- (c) Co-Counsel:

Nathan Lewin
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400
Counsel for Other Parties:

Kent L. Jones
Assistant to the Solicitor General
U.S. DEPARTMENT OF JUSTICE
Washington, D.C. 20530
(202) 514-3948
(Counsel for the United States)

9. Atlas, Ltd. v. Kingman Warehouse Co. VIII, et al., 357 N.W.2d 584 (Iowa 1984)

The case involved a suit by the developer of a warehouse against the purchasers, an investment partnership and its individual partners, for fulfillment of the terms of the purchase contract. The investors contended that the investment has been misrepresented to them, and they sued the partnership's lawyer (who was also an investment partner) and his law

firm for indemnification and malpractice. We represented the plaintiff and were retained particularly for the purpose of litigating the various conflict-of-interest claims. After discovery, pretrial motions, and an interlocutory appeal by certain parties to the Supreme Court of Iowa, the litigation was settled. I was responsible for the representation, with substantial assistance from another partner in the firm.

- a) 1983-1985
- b) Iowa District Court for Linn County: Hon. Forest E. Eastman (sitting by designation from the Iowa District Court for Blackhawk County)
- c) Co-counsel:

Seth P. Waxman
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 833-5125

Dennis J. McMenimen
SIMMONS, PERRINE, ALBRIGHT & ELLWOOD
115 Third St., S.E.
Cedar Rapids, Iowa 52401
(319) 366-7641

Lawrence E. Blades
BLADES, CARMICHAEL, ROSSER & BENZ
101 Third Ave., S.E.
Cedar Rapids, Iowa 52401
(319) 363-1013

Counsel for Other Parties (Partial list, per instructions of Committee staff):

Steven M. Schneebaum
PATTON, BOGGS & BLOW
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6300
(Counsel for defendant Fred Ertl)

Donald G. Ribble
 Scott E. McLeod
 LYNCH, DALLAS, SMITH & HARMAN, P.C.
 526 Second Ave., S.E.
 Cedar Rapids, Iowa 52406
 (319) 365-9101
 (Counsel for Defendant James Hall)

10. First Teachers Investment Corp., et al. v. Commissioner of Internal Revenue, 40 T.C.M. (CCH) 892, T.C. Mem. 1980-302 (U.S. Tax Ct. 1980)

This was a trial of a complex tax case that involved the factual and legal issue whether the taxpayer, which had invested in a money-losing venture, could properly have taken fraud losses or whether, because of the taxpayer's relationships with those involved in the venture, such tax treatment was improper. I tried the case with a more senior lawyer in the firm. The court ruled for our client on most of the issues, after which there was a settlement of the remaining issues.

- (a) 1977-1980
- (b) United States Tax Court Judge Irwin
- (c) Co-counsel:

Nathan Lewin
 MILLER, CASSIDY, LARROCA & LEWIN
 2555 M Street, N.W.
 Washington, D.C. 20037
 (202) 293-6400
 (Counsel for Leslie W. Nimmo and Betty P. Nimmo)

Robert D. Grossman, Jr.
 1101 14th Street, N.W.
 Washington, D.C. 20005
 (202) 842-4840
 (Counsel for Teachers Finance Company)

Counsel for other Parties:

Frank J. Coyne, Jr.
 Internal Revenue Service
 1111 Constitution Avenue, N.W.
 Washington, D.C. 20530
 (202) 622-3300
 (Counsel for Commissioner of Internal Revenue)

17. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

1. Activities at Miller, Cassidy, Larroca & Lewin

American Association of Retired Persons

From 1985 to 1992, I advised and represented the American Association of Retired Persons ("AARP") on two health care issues — access to skilled nursing facilities and access to home health care. After receiving complaints from its members, AARP became concerned that certain policies and practices of the Health Care Financing Administration ("HCFA"), not subject to public notice and comment, were having the effect of denying to Medicare recipients benefits provided by law. We drafted complaints, prepared for possible administrative action, had lengthy discussions with the relevant HCFA representatives and ultimately resolved both issues without litigation.

Aetna

From 1991 to 1993, I represented Aetna Life and Casualty Company in responding to allegations involving the use of a consultant by subsidiaries of the company in connection with the sale between 1982 and 1991 of various investment products and services to certain state and local government retirement boards primarily in Massachusetts. I provided advice and counsel to the senior management of the company and coordinated the development of factual and legal positions in the various investigations that ensued, as well as advising on various collateral issues. I also consulted with Aetna concerning revisions to the company's internal corporate compliance program.

General Electric

From 1988 to 1993, with another partner, I advised various components of General Electric Corporation ("GE") on several matters including internal investigations pursuant to the company's corporate compliance program, grand jury investigations into allegations arising out of defense procurement contracts, voluntary disclosures to the government and possible suspension or debarment. During my involvement in these matters, none with one exception resulted in any civil litigation or criminal proceedings. I was responsible for overseeing the factual inquiries, development of legal positions and advising the client on a wide range of legal matters.

R. Hunter Cushing

From 1989 to 1991, I represented R. Hunter Cushing, who had been Deputy Assistant Secretary at the Department of Housing and Urban Development and Deputy Commissioner of the Federal Housing Administration in the Reagan Administration, in connection with the Independent Counsel inquiry into that Department's activities. My role in this matter was to advise him on the law applicable to the facts in issue and to counsel him with respect to his dealings with the Independent Counsel congressional inquiries, and with others interested in this matter, including private litigants in suits against the Department.

2. Activities as General Counsel of the Department of Defense

As General Counsel of the Department of Defense, I have been involved in a myriad of legal matters not involving participation in litigation, including decisions with regard to intelligence activities, the crafting of international agreements, legal issues connected with the Secretary's initiative to increase opportunities for women in the military services, the legal implications of certain financial management issues within the Department, significant contract disputes, legal advice with respect to criminal and administrative investigations, environmental issues, review of the organizational structure and competence

of the Department's investigative resources, assessment of the appropriate role of the Department with respect to proposed mergers and acquisitions in the defense industry, etc.

ASSETS			LIABILITIES		
Cash on hand and in banks	5	000 00	Notes payable to banks—secured		00
U.S. Government securities—add schedule	391	629 00	Notes payable to banks—unsecured		00
Listed securities—add schedule		00	Notes payable to relatives		00
Unlisted securities—add schedule		00	Notes payable to others		00
Accounts and notes receivable:			Accounts and bills due		00
Due from relatives and friends		00	Unpaid income tax		00
Due from others		00	Other unpaid tax and interest		00
Doubtful		00	Real estate mortgages payable—add schedule	280	000 00
Real estate owned—add schedule	730	000 00	Chattel mortgages and other liens payable		00
Real estate mortgages receivable		00	Other debts—itemize:		00
Autos and other personal property	111	175 00			
Cash value—life insurance	13	875 00			
Other assets—itemize:		00			
IRA's	657	373 00			
			Total liabilities	280	000 00
			Net worth	1,688	514 00
			Total liabilities and net worth	1,968	514 00
Total assets	1968	514 00			
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, cosigner or guarantor		00	Are any assets pledged? (Add schedule.)	No	
On leases or contracts		00	Are you defendant in any suits or legal actions?	No	
Legal Claims		00	Have you ever taken bankruptcy?	No	
Provision for Federal Income Tax		00			
Other special debt		00			

ASSETS

Banks:

Crestar	\$ 5,000.00
TOTAL:	\$ 5,000.00

Government Securities:

Daniel Waldhorn	\$ 59,662.00
Zero Coupon Bonds	
TOTAL:	\$ 59,662.00

Securities:

JAMIE S. GORELICK ASSETS:	
Crimson Partners (Cramer Fund)	\$ 96,000.00
Zapit Technology	\$ 15,000.00
Ivanhoe Associates	\$ 0.00

JOINT ASSETS:	
Fidelity Contra Fund	\$ 153,826.00
Fidelity Equity Income II Fund	\$ 99,253.00

DANIEL WALDHORN:	
Fidelity Blue Chip Stock Fund	\$ 27,350.00
TOTAL:	\$ 391,429.00

Other Assets:

JAMIE S. GORELICK IRAs:	
Fidelity Asset Manager Fund	\$ 120,922.00
Vanguard Windsor Stock Fund	\$ 44,265.00
Crimson Partners (Cramer Fund)	\$ 89,000.00

RICHARD E. WALDHORN IRA:	
Vanguard Windsor Stock Fund	\$ 44,272.00

RICHARD E. WALDHORN KEOGH ACCOUNTS:	
Vanguard (Windsor & Investment Grade Funds)	\$ 200,544.00
TIAA-CREF	\$ 81,445.00

RICHARD E. WALDHORN SRA:	
TIAA-CREF	\$ 76,925.00
TOTAL:	\$ 657,373.00

Real Estate:

3713 Williams Lane	\$ 730,000.00
Chevy Chase, MD	

TOTAL: \$ 730,000.00

Automobiles & Other Personal Property:

1993 Mercury Voyager Van	\$ 12,050.00
1992 Acura Legend	\$ 22,125.00
1988 Honda Civic	\$ 2,000.00
Other	\$ 75,000.00

TOTAL: \$ 111,175.00

Life Insurance:

Jamie S. Gorelick	\$ 5,719.00
Richard E. Waldhorn	\$ 8,156.00

TOTAL: \$ 13,875.00

TOTAL: \$1,968,514.00

LIABILITIES

Real Estate Mortgage:

Home Mortgage	\$ 280,000.00
(Mortgagor: First Federal Savings & Loan Association of Rochester)	

TOTAL: \$ 280,000.00

III GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

From the beginning of my years in private practice, I took on pro bono and reduced-fee representations and was active in organizations whose purpose it was to provide legal services to those in need. One particular area of interest has been women's rights. I was on the list of attorneys on whom the Women's Legal Defense Fund would call for the evaluation or litigation of cases. I took on individual matters, such as the Mendaro case, described above.

~~I also took cases by appointment by the court.~~ An example of such a matter is Thurston v. United States, 696 F. Supp. 680 (D.D.C. 1988), in which a divorced spouse sought survivor annuity benefits under her former husband's Foreign Service Election of Annuity Benefits contract. She was handling the matter pro se; the court appointed me to represent Ms. Thurston in pressing her claims.

I often took on matters on a reduced-fee basis. For example, I represented Colette Bohatch with respect to remedies she might have arising out of her termination by a law firm to which she had reported an alleged ethical violation by one of its partners. Ultimately, suit was successfully brought in Texas by Texas counsel. Bohatch v. Butler & Binion, No. 91-53813, District Court, Harris County, Texas.

I also fulfilled my pro bono commitment through organizational activities. In addition to my work with the Women's Legal Defense Fund, I worked with the Washington Legal Clinic for the Homeless, the National Women's Law Center and the Bazelon Center for Mental Health Law in their efforts to represent those in need of legal assistance. As President of the District of Columbia Bar, one of my principal efforts was to revamp the Bar's pro bono program through the Public Service Activities Corporation on whose Board I served during my term. Through the extraordinary

efforts-of many people, the Bar's program is now much more effective in encouraging lawyers to donate their time, training them to provide the kinds of services that are needed and matching them with clients in need. I also contributed time to raising funds for the Bar's pro bono programs, for the D.C. Bar Foundation -- which funds legal services providers in the District -- and for the Legal Aid Society. I estimate that I devoted on average fifteen percent of my time to these various activities.

2. Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex, or religion -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

In 1993 I became a member of the Women's Forum. I am not aware whether it has male members. I am informed that there are two men among the honorary members.

Executive Branch PUBLIC FINANCIAL DISCLOSURE REPORT

Reporting Status <input checked="" type="checkbox"/> Incumbent <input type="checkbox"/> Former		Calendar Year Covered by Report <input checked="" type="checkbox"/> New Entrant, Nominee, or Volunteer <input type="checkbox"/> Termination		Termination Date (If Applicable) (Month/Day/Year)		Agency Use Only	
Reporting Individual's Name Last Name: <u>CORELICK</u> First Name and Middle Initial: <u>Janle S.</u>		Department or Agency (If Applicable) <u>Department of Justice</u>		Termination Date (If Applicable) (Month/Day/Year)		Agency Use Only	
Position for Which Filing <u>Deputy Attorney General</u>		Address (Number, Street, City, State, and ZIP Code) <u>Room 35980, Pentagon, Washington, DC 20301</u>		Telephone No. (Include Area Code) <u>(703) 695-3341</u>		Fee for Late Filing Any individual who is required to file this report and does so more than 30 days after the date the extension required to be filed, or if an extension is not filed, after the last day of the filing extension period shall be subject to a \$200 fee.	
Location of Present Office (If forwarding address) <u>Presidents' Hall with the Federal Government, During the President's 12 Months (If Not Same as Above)</u>		Title of Position and Duties Held <u>Department of Defense General Counsel</u>		Reporting Periods Incumbents: The reporting period is the preceding two calendar years except Part II of Schedule C, Part III of Schedule D where you must also include the filing year up to the date you file. Part II of Schedule D is not applicable. Termination Filers: The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination. Part II of Schedule D is not applicable. Nominees, New Entrants and Vice Presidents: The reporting period for income (BLOCK C) is the preceding calendar year and the current calendar year up to the date of filing. Value assets as of any date you choose that is within 31 days of the date of filing. Schedule B-Not applicable. Schedule C, Part I (Liabilities)-The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing. Schedule C, Part II (Agreements or Arrangements)-Show any agreements or arrangements as of the date of filing. Schedule D-The reporting period is the preceding two calendar years and the current calendar year up to the date of filing.		Reporting Periods Incumbents: The reporting period is the preceding two calendar years except Part II of Schedule C, Part III of Schedule D where you must also include the filing year up to the date you file. Part II of Schedule D is not applicable. Termination Filers: The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination. Part II of Schedule D is not applicable. Nominees, New Entrants and Vice Presidents: The reporting period for income (BLOCK C) is the preceding calendar year and the current calendar year up to the date of filing. Value assets as of any date you choose that is within 31 days of the date of filing. Schedule B-Not applicable. Schedule C, Part I (Liabilities)-The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing. Schedule C, Part II (Agreements or Arrangements)-Show any agreements or arrangements as of the date of filing. Schedule D-The reporting period is the preceding two calendar years and the current calendar year up to the date of filing.	
Signature of Reporting Individual <u>Janle S. Corelick</u>		Signature of Other Reviewer (If directed by agency)		Do You Intend to Create a Qualified Disfavored Trust? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		Termination Date (If Applicable) (Month/Day/Year)	
Agency Ethics Official's Opinion The information contained in this report discloses no conflict of interest under applicable law and OGE instructions.		Signature of Designated Agency Ethics Official/Reviewing Official		Do You Intend to Create a Qualified Disfavored Trust? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		Termination Date (If Applicable) (Month/Day/Year)	
Office of Government Ethics Use Only		Signature		Do You Intend to Create a Qualified Disfavored Trust? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		Termination Date (If Applicable) (Month/Day/Year)	
Comments of Reviewing Official (If additional space is required, use the reverse side of this sheet)							

(Check box if your assets are contained on the reverse side)

Reporting Individual's Name

CORELICK, Jamie S.

SCHEDULE A

Page Number

1

BLOCK A		BLOCK B		BLOCK C											Date (Mo, Day, Yr.)																	
				Assets and Income		Valuation of Assets at close of reporting period		Type		Amount																						
Identify each asset held for the production of income which had a fair market value exceeding \$1,000 at the close of the reporting period. Identify each asset or source of income which generated over \$200 in income during the reporting period.		None <input type="checkbox"/>		None (or less than \$1,001)	\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$250,000	\$250,001 - \$500,000	\$500,001 - \$1,000,000	Over \$1,000,000	Dividends	Rent and Royalties	Interest	Capital Gains	Excepted Investment Fund	Excepted Trust	Qualified Trust	Other (Specify Type)	None (or less than \$201)	\$201 - \$1,000	\$1,001 - \$2,500	\$2,501 - \$5,000	\$5,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$1,000,000	Over \$1,000,000	Actual Amount Only if "Other" specified			
1	Control Airwaves Coalition Des Jones & Smith, Homestead, USA Kempston Equity Fund Des Jones & Smith pension plan																															
2	Miller, Cassidy, Larroca & Lewin																		Partnership Income									\$205,951				
3	Wiley & Sons (asset value not ascertainable)																															
4	Georgetown University																		Salary													
5	Puritan - Bennett																		Honorarium for Medical Lecture									\$250			1/15/93	
6	Pulmonary Associates of Richmond																		Honorarium for Medical Lecture									\$500			2/26/93	
7	Raven Press (asset value not ascertainable)																															

Reporting Individual's Name

GORELICK, Jamie S.

SCHEDULE A

Page Number

4

Assets and Income

BLOCK A

Identify each asset held for the production of income which has a fair market value exceeding \$1,000 at the close of the reporting period.

Identify each asset or source of income which generated over \$200 in income during the reporting period.

None ☐

1. ☐ Consult/Adviser/Commission

2. ☐ Ex. Div. - Dow Jones & Smith, Hamilton, USA

3. ☐ Ex. Div. - Kemper Equity Fund

4. ☐ Ex. Div. - Dow Jones & Smith pension plan

Supplemental Retirement Annuity:

TIAA-CREF

Unif-Gift to Mirrors Act (College Fund) (Govt Treasuries)

Unif-Gift to Mirrors Act (College Fund) - Fidelity Blue Chip Stock Fund

Life Insurance Trust:

Daniel Waldhorn, Beneficiary

(Journal of N.Y.)

Life Insurance Trust:

Daniel Waldhorn, Beneficiary

(Mutual of N.Y.)

Healthcare Education

Santitree, Inc.

Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.

BLOCK C

Amount

Type

BLOCK B

Valuation of Assets at close of reporting period

None (or less than \$1,001)

Over \$1,000,000

Actual Amount Only if "Other" specified

Date (Mo, Day, Yr)

Only if "Other" specified

Honors

Capital Gains

Dividends

Rents and Royalties

Interest

Capital Gains

Excepted Investment Fund

Excepted Trust

Qualified Trust

Other (Specify Type)

None (or less than \$201)

None (or less than \$201)

\$201 - \$1,000

\$1,001 - \$5,000

\$5,001 - \$15,000

\$15,001 - \$50,000

\$50,001 - \$100,000

\$100,001 - \$250,000

\$250,001 - \$500,000

\$500,001 - \$1,000,000

Over \$1,000,000

None (or less than \$201)

None (or less than \$201)

None (or less than \$201)

None (or less than \$201)

GORELICK, Jamie S.

Page Number

42

Assets and Income

Valuation of Assets
at close of
reporting period

Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.

[illegible]

GORELICK, Jamie S.

Attachment to SF 278

CRIMSON PARTNERS

Crimson Partners is a partnership of 40 people. Its sole asset is a share in the Cramer Fund which is widely held and publicly available. I neither exercise control over nor have the ability to exercise control over the financial interests held by the fund. In addition, I have no knowledge of the assets of the fund. The fund meets the definition of an excepted investment fund.

SF 278 (Rev. 1/81)
 U.S. Office of Government Ethics

Reporting Individual's Name
 CORELICK, Jamie S.

New Entrant/Nominee/Candidate?
☒ Yes ☐ No

Page Number
 5

SCHEDULE B
 Schedule Not Applicable

Part I: Transactions

Report any purchase, sale, or exchange by you, your spouse, or dependent child during the reporting period of any real property, stocks, bonds, commodity futures, and other securities when the amount of the transaction exceeded \$1,000. Include transactions that resulted in a loss. Do not report a transaction involving property used solely as your personal residence, or a transaction solely between you, your spouse, or dependent child. Check the "Certificate of divestiture" block to indicate sales made pursuant to a certificate of divestiture from OGE.

Line Number	Identification of Asset	Transaction Type (a)	Date (b/c) Date (b/c) Day, Yr.	Purchase	Sale	Exchange	Amount of Transaction (d)									
							\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$250,000	\$250,001 - \$500,000	\$500,001 - \$1,000,000	\$1,000,001 - \$5,000,000	\$5,000,001 - \$10,000,000	\$10,000,001 - \$50,000,000	\$50,000,001 - \$1,000,000,000
1	Example: Central Airlines Common		2/1/91													
2																
3																
4																
5																

Part II: Gifts, Reimbursements, and Travel Expenses

Report the source, a brief description (including travel, dates, and the nature of expenses provided), and the value of: (1) transportation, lodging, food, or entertainment received from one source totaling \$250 or more (unless received as personal hospitality at the donor's personal or family residence); (2) other gifts from one source totaling \$100 or more in value; and (3) cash reimbursements of \$250 or more from one source. Exclude gifts, reimbursements and travel expenses from the U.S. Government. Also exclude gifts from relatives within the third degree of relationship for the total for one source, and gifts and reimbursements received by your spouse or dependent child that were given totally independent of the relationship to you. See instructions for further exclusions.

Line Number	Source (Name and Address)	Brief Description	Value	
			None	Non
1	Example: Art Ann of Book Collectors, NY, NY Art Ann of Book Collectors, NY, NY	Art Ann of Book Collectors, NY, NY Art Ann of Book Collectors, NY, NY Leather business for retiring president	\$600	\$125
2				
3				
4				
5				

GORELICK, Jamie S.

SCHEDULE C

6

Part I: Liabilities

Report liabilities over \$10,000 owed to any one creditor at any time during the reporting period by you, your spouse, or dependent child. Check the highest amount owed during the reporting period. Exclude a mortgage on your personal residence unless it is rented out; loans secured by automobiles, household furniture or appliances; and liabilities owed to certain relatives listed in instructions. See instructions for revolving charge accounts.

Creditor (Name and Address)		Type of Liability	Date Incurred	Interest Rate	Term if applicable	Clarity of Amount or Value (\$)					
1	Example: Joe Doe, 123 St., Washington, DC	Mortgage on private property, Delaware	1981	12%	20 yrs.	15,000	15,000	15,000	15,000	15,000	15,000
2		Promissory note	1989	10%	on demand	500	500	500	500	500	500
3											
4											
5											

Part II: Agreements or Arrangements

Report your agreements or arrangements for future employment, leave of absence, continuation of payment by a former employer (including severance payments), or continuing participation in an employee benefit plan. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

Status and Terms of any Agreement or Arrangement		Period	Date
Example: Pursuant to partnership agreement, will receive lump sum payment of capital account & partnership share calculated on service performed through 1991 and related pension benefits (independently managed, fully funded, defined contribution plan)	Do Jones & Smith, Hometown, USA		198
1			
2			
3			
4			
5			
6			

GORELICK, Jamie S.		SCHEDULE D	Page Number 7
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Part I: Positions Held Outside U.S. Government

Report any positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or

consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

Example	Position (Name and Address)	Type of Organization	Position Held	From (Mo, Yr)	To (Mo, Yr)	Present
	Doe Jones & Smith, Hometown, USA	Non-profit education Law firm	President Partner	6/82 7/86	1/91	
1	Miller, Cassidy, Larroca & Lewin, Washington, DC	Law Firm	Partner	1/81	4/93	
2	District of Columbia Bar	Bar	President	6/92	7/93	
3	District of Columbia Bar	Bar	President-Elect	6/91	6/92	
4	American Bar Association	National Bar Association	Member, House of Delegates	6/92	6/93	
5	American Bar Association	National Bar Association	Member, Committee on Judicial Nominations	10/92	6/93	
6	American Bar Association	National Bar Association	President, Member, Sec. of Litigation	8/90	6/93	

Part II: Compensation In Excess Of \$5,000 Paid by One Source

Report sources of more than \$5,000 compensation received by you or your business affiliation for services provided directly by you during the reporting period. This includes the names of clients and customers of any corporation,

firm, partnership, or other business enterprise, or any non-profit organization when you directly provided the services generating a fee or payment of more than \$5,000. You need not report the U.S. Government as a source.

Source (Name and Address)	Kind/Description of Duties	Incumbent/ Termination File/ Candidate: Not Applicable
Example Doe Jones & Smith, Hometown, USA Mega University (client of Doe Jones & Smith), Hometown, USA	Legal services Legal services in connection with university curriculum	<input type="checkbox"/>
1		
2	Miller, Cassidy, Larroca & Lewin Aetna Life & Casualty, Hartford, Conn.	Legal services Legal counsel with respect to litigation & other matters
3	Colette K. Bohatch, Washington, DC	Legal counsel in connection with certain claims
4	Chemical Waste Management, Oakbrook, Illinois	Legal counsel with respect to government contracting
5	Clark Clifford & Robert Altman, Washington, DC	Legal counsel with respect to possible claims
6	General Electric Aircraft Engines, Cincinnati, OH	Legal counsel with respect to certain litigation

GORELICK, Jamie S.		Page Number 8
SCHEDULE D		

Part I: Positions Held Outside U.S. Government

Report any positions held during the applicable reporting period, whether compensation was received or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or

consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

Examples	Name (Last, First, Middle Initial) Do Jones & Smith, Hometown, USA	Organization (Name and Address) Do Jones & Smith, Hometown, USA	Non-profit election Yes _____ No _____	Date of Organization 1/1/80	Position Held President	Term (Mo, Yr) 6/83 to 6/86	To (Mo, Yr) 1/91	None <input type="checkbox"/>
1	American Bar Foundation			Foundation	Fellow	1/86	Present	
2	National Women's Law Center, Washington, D.C.			Non-profit organization	Board of Directors	6/89	6/93	
3	Mental Health Law Project, Washington, D.C.			Non-profit organization	Board of Directors	8/90	6/93	
4								
5	Washington Legal Clinic for the Homeless			Non-profit organization	Advisory Board to Home Court	11/89	9/92	
6	Harvard University, Cambridge, MA			University	Overseers Cmte. to visit Harvard Col.	5/89	6/93	

Part II: Compensation In Excess Of \$5,000 Paid by One Source

Report sources of more than \$5,000 compensation received by you or your business affiliation for services provided directly by you during the reporting period. This includes the names of clients and customers of any corporation,

firm, partnership, or other business enterprise, or any non-profit organization when you directly provided the services generating a fee or payment of more than \$5,000. You need not report the U.S. Government as a source.

Examples	Source (Name and Address) Do Jones & Smith, Hometown, USA	Legal services Legal services in connection with university construction	Brief Description of Duties	Incumbent/ Termination Filer/ Candidate: Not Applicable <input type="checkbox"/>	None <input type="checkbox"/>
1	News University Center of Do Jones & Smith, Hometown, USA				
2	General Electric Aerospace, King of Prussia, PA		Legal Counsel with respect to government contracting		
3	Robert A. Lewis, Washington, D.C.		Legal counsel with regard to inquiry		
4	National Public Radio, Washington, D.C.		Legal counsel with regard to certain claims		
5					
6					

Reporting Individual's Name

GORELICK, Jamie S.

SCHEDULE D

Page Number

9

Part I: Positions Held Outside U.S. Government

Report any positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or fraternal, or political entities and those solely of an honorary nature.

None ☐

Example	Organization (Name and Address)		Type of Organization	Position Held	From (Mo, Yr)		To (Mo, Yr)
	Street	City, State, Zip			From	To	
1	American Law Institute		Non-profit organization	Member	6/87	6/87	Present
2	U.S. District Court, Washington, D.C.		Judicial Committee	Committee on Grievances	5/91	5/91	6/93
3							
4							
5							
6							

Part II: Compensation In Excess Of \$5,000 Paid by One Source

Report sources of more than \$5,000 compensation received by you or your business affiliation for services provided directly by you during the reporting period. This includes the names of clients and customers of any corporation, firm, partnership, or other business enterprise, or any non-profit organization when you directly provided the services generating a fee or payment of more than \$5,000. You need not report the U.S. Government as a source.

Incumbent/

Termination File/

Candidate: ☐

Not Applicable ☐

None ☐

Source (Name and Address)	Brief Description of Duties	
	Legal services	Legal services in connection with university construction
Example: Doe Jones & Smith, Hometown, USA		
Example: Moore University (client of Doe Jones & Smith), Mobergown, USA		
1		
2		
3		
4		
5		
6		



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D. C. 20530

MAY 12 1994

The Honorable Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
Dirksen Senate Office Building, Room 224
United States Senate
Washington, D.C. 20510-8275

Dear Mr. Chairman:

Thank you for sending me the additional questions submitted by Senators Leahy, Simpson, and Pressler following Jamie Gorelick's confirmation hearing for Deputy Attorney General. I am pleased to forward the attached answers to those questions as a supplement to the Judiciary Committee's record of proceedings regarding that nomination.

If I can provide you or any other members of the committee any additional information on these or other matters, please do not hesitate to be in contact with me.

Sincerely,

A handwritten signature in cursive script that reads "Sheila Anthony".

Sheila F. Anthony
Assistant Attorney General

WRITTEN QUESTIONS OF SENATOR PATRICK J. LEAHY
FOR THE NOMINATION OF JAMIE GORELICK TO BE
DEPUTY ATTORNEY GENERAL
March 16, 1994

Clipper Chip

On February 4, 1994, the Administration announced it was moving forward with its key escrow encryption program. Under this program, government agencies will be furnished with and hold the keys to decrypt communications should such communications become the subject of a lawful wiretap order.

The Administration has stated that this technology provides government agencies with no new authority to access the content of the private conversations of Americans. I wrote to the Attorney General on February 16, 1994 asking for the legal analysis the Administration used to reach this conclusion. I have not yet received a response.

Would you look into this matter when you get to the Justice Department because I would appreciate a response?

The computer Security Act of 1987 designates the National Institute of Science and Technology (NIST) of the Commerce Department as the primary agency for civilian encryption and Clipper Chip encryption program was developed by NSA. Some critics have raised questions about whether the Administration's Clipper Chip program may violate the Computer Security Act. What do you think?

On March 17, Associate Attorney General Hubbell responded for the Department, to your letter of February 16 regarding the important question of the interplay between encryption keys and privacy. As that letter indicates, the fact that a communication is encrypted, whether or not with key-escrow encryption, does not change the Constitutional or statutory privacy protections and procedures afforded such a communication. The existing obligations placed on government agencies seeking to conduct electronic surveillance, and the circumstances under which such surveillance may take place are, and should be, unaffected by the nature of the technology necessary to conduct the surveillance.

The National Institute of Standards and Technology (NIST) has worked closely with NSA on the clipper chip development project because of NSA's historical and institutional knowledge in this field. Substantial participation by NSA, explicitly authorized by the Computer Security Act, was necessary, in the words of the Act, to "avoid unnecessary and costly duplication of effort". I do not believe that NSA's participation in the clipper chip development could be construed as a violation of that law.

Prosecutorial Experience

You have a fine record with many notable accomplishments in the legal profession. However, you do not have any experience as a prosecutor. As Deputy Attorney General, you will have line authority over a number of Justice Department investigations and prosecutions.

What experiences have you had that prepare you for these new responsibilities?

Over the course of the last year, while serving as General Counsel of the Department of Defense, I was ultimately

responsible for the oversight of the nation's second largest prosecutorial staff -- that of the Military Justice System. In that capacity, I was required to make judgments concerning complex and sensitive criminal matters in the military justice system.

In addition, in my private practice, I regularly handled complex individual and corporate criminal cases and am quite familiar with substantive and procedural criminal law, with the prosecutive process, and with the functioning of U.S. Attorneys offices. Finally, it is important to note that while I will, indeed, have authority in the chain of command over Justice Department investigations and prosecutions, the Attorney General and the Assistant Attorney General for the Criminal Division, who will be involved in all decisions regarding critical criminal matters, both are experienced criminal prosecutors.

Digital Telephony

When you are confirmed, will you work with me to resolve the digital telephony problem in a way that balances law enforcement needs, the privacy interests of all Americans and the needs of industry to protect the security of computer and communications systems?

As indicated above, I believe that it is critical to maintain the privacy protections guaranteed by law and the Constitution. I would be pleased to work with you, Senator Leahy, and any other member of the Senate or House who shares our commitment to providing all necessary tools to law enforcement officials without compromising the privacy rights of Americans.

Medical Privacy

When you are confirmed, will you work with me on legislation to incorporate adequate privacy protections into comprehensive health care legislation?

Patient privacy must be preserved, and I will work to ensure that it is. Privacy must also be balanced against important law enforcement interests, because patients will get more affordable quality care when we have done all that we can to end health care fraud.

The Department of Justice's private and public health care fraud prosecutorial obligations have provided considerable experience in dealing with the balance between criminal justice and privacy concerns, and we feel confident in our ability to continue to fairly strike that balance in the future. When considering the adoption of new legislation, we should look carefully to determine whether existing statutory provisions provide the desired protections.

Drug Intelligence

Under what circumstances can the Department of Defense or other government agencies gain access to intelligence gathered by the 19 federal drug intelligence centers now in existence?

How is this access obtained? Are agencies linked by computer lines or in some other automated fashion? Which agencies?

What controls, if any, exist on a particular agency's use of this information?

The drug intelligence centers are each creatures of existing federal agencies like DEA, DOD, DOT, CIA, Coast Guard and the Customs Service. The El Paso Information Center (EPIC), operated by the DEA, is a clearinghouse for tactical intelligence and the collection, processing, analysis, and dissemination of information related to worldwide drug movement, alien smuggling, and weapons smuggling.

Through both computer hook-ups and the exchange of personnel, information is shared, on a continuing basis, between federal agencies and international law enforcement organizations with a counterdrug mission. The FBI and the DEA are currently developing a joint index which will allow automated sharing of drug related investigative information.

Generally, data usage is limited by data distribution policies of the DEA and the DOD, in addition to any legal constraints on distribution. DEA policy permits dissemination of law enforcement investigative information to other agencies only on a legitimate need to know basis. Collection and dissemination of data by DOD is severely constrained by the DOD's "Procedures Governing the Activities of DOD Intelligence Components that Affect United States Persons" (Directive 5240.1-R.)

Questions for Jamie Gorelick
Nominee to be Deputy Attorney General
Department of Justice

Submitted by Senator Alan K. Simpson

March 17, 1994

1. I noted in your remarks that you pledge to uphold the Department's tradition of independence and professionalism -- to base your advice on legal judgments, not political calculations. I would hope the Attorney General has set a good example for you in that regard.

One of my concerns over the last ten years has to do with an amendment we adopted in 1982 to the Voting Rights Act which obliges the gerrymander of political institutions to promote the election of ethnic candidates. There is nothing un-American about members of ethnic groups wanting to choose representatives of their "own," and any state action to limit voters in making that choice would be impermissible discrimination.

But I believe the law should not be used to gerrymander, or in any other way, to encourage immigrants (my special interest) and others to believe that the only way they can achieve fair representation in the American political system is through ethnic representation. That is a dangerous idea that pushes voters to believe that all their interests are to be represented only, or even best, on an ethnic basis.

What is your view of the type of gerrymandering addressed in the recent Supreme Court case of Shaw v. Reno, which tried to confront some of these problems with the manipulation of the redistricting process?

There is an important difference between encouraging a group to vote only along racial or ethnic lines and making it possible for individuals from a specific racial or ethnic heritage to be fairly represented. It is absolutely critical that we preserve gains that have been made in recent years through the vigilant application of the Voting Rights Act. While we must carefully consider the concerns expressed by the Court in Shaw v. Reno, it is also essential that we recognize the reality of racially polarized voting and make sure that all citizens have an opportunity to be fairly represented. The Justice Department will participate in pending voting rights cases in order to preserve the rights of racial and ethnic minorities.

2. If you are confirmed to be the Deputy Attorney General, what will be your position on responding to the Wall Street Journal's Freedom of Information Act request on the Park Police report on Vincent Foster's death.

I am a strong believer in the Freedom of Information Act. I believe that the President's Executive Order setting an "actual harm" standard for the withholding of documents despite their protection by FOIA is a healthy approach to governing. And I am proud of the Justice Department's efforts to make documents of substantial public interest available in response to FOIA requests on an expedited basis.

Unfortunately, because the Wall Street Journal's FOIA request is the subject of litigation, it would be inappropriate for me to comment upon it.

QUESTIONS BY SENATOR LARRY PRESSLER
 CONFIRMATION HEARING OF JAMIE GORELICK
 TO BE DEPUTY ATTORNEY GENERAL
 SENATE COMMITTEE ON THE JUDICIARY
 MARCH 15, 1994

When your predecessor, Philip Heymann, hit the TV talk shows following his departure from the Justice Department, he rebuked the Clinton Administration for embracing several of the tough crime fighting measures contained in the crime bill the Senate passed last fall, most notably the "three-strikes-and-you're-out," proposal, which calls for lifetime imprisonment for certain convicted felons.

- (1) What is your assessment of the Senate-passed crime bill?

I believe that the Senate passed crime bill was a very good, though not perfect, crime bill. There are some provisions in the Senate bill that I strongly support, like the funding for additional police on the beat, and there are some provisions that I strongly oppose, like the federalization of a broad range of everyday firearms crimes. I believe that we need a balanced crime bill that recognizes the need to be tough -- with provisions like "three strikes and you're out" -- and smart -- with programs like the Youth Employment Skills (YES) program to give young people an alternative to crime.

- (2) What steps do you think can be taken at the Federal level to reduce the amount of violent crime in our society?

The Federal government has three distinct roles with respect to fighting violent crime: direct participation, funding assistance, and "leadership by example". In areas where the federal government is uniquely suited to participate in the fight against crime -- like crimes that involve interstate drug activity, the federal government should be using its agents and prosecutors to put violent criminals behind bars.

By providing funding for crime prevention grant programs, community policing programs, and prison construction programs, the federal government is doing its part to assist the states in the fight against crime, sharing the financial burden. And, in areas in which state and local law enforcement agencies are on the front line, the federal government can demonstrate policy leadership as it has done with its truth-in-sentencing policies and as it will do with the passage of a sensible federal "three strikes and you're out" proposal.

- (3) As the holder of the second most powerful post at the Department of Justice, should you be confirmed, what will have a higher priority for you in your work than fighting violent crime?

I will have only one personal priority equal to that of fighting crime, and that is working to make the Department of Justice operate as efficiently and effectively, as possible -- in all of its areas of responsibility.

RURAL DRUG CRIME

The Clinton Administration has proposed the elimination of the Edward Byrne Memorial State and Local Law Enforcement Assistance

Formula Grant Program in the President's budget proposal for FY '95. This federal matching grant program, administered by the Office of Justice Programs at the Department of Justice, serves an absolutely crucial role in the drug enforcement and drug treatment efforts of most rural states.

The Clinton Administration optimistically asserts this eliminated funding will be replaced largely by provisions in the crime bill. While the Senate-passed version of the crime bill does contain numerous provisions relating to drug control, we do not know for certain that these provisions will survive the likely conference committee on the crime bill.

The President's budget also proposes doubling the discretionary portion of the Byrne grant program from \$50 million for FY '94 to \$100 million for FY '95. However, this increase, if appropriated, still would mean a drastic cut from this year's budgetary authority of \$358 million for the formula grant portion of the program.

- (1) What do you think of the Administration's proposal to eliminate the Byrne formula grant program?

I support the Administration's decision to return the discretionary funding level to \$50 million and to make sure there are sufficient Byrne Grant Formula funds to cover the cost of existing multi-jurisdictional task forces -- task forces that would have been eliminated without such funding. Otherwise, I believe that the approximately seven-fold increase in funds being made available to the states under the Administration's crime legislation should make up for other Byrne Grant losses.

- (2) What will you do to ensure that rural areas get their fair share of federal resources to fight crime?

The crime bills contain provisions aimed at helping to guarantee that rural Americans get their fair share of crime-fighting funding. Both the House and Senate versions of the crime bill provide that a substantial portion of the community policing grants must go to smaller communities. In addition, many of the crime prevention and control initiatives in the crime bills include features intended to ensure adequate attention to small and rural jurisdictions.

I recognize the degree to which violent crime has left the borders of the cities, and the Administration supports efforts to make sure resources are available to fight emerging drug and gang problems in rural regions. We will continue to develop the Administration's anti-violent crime initiative, which works to coordinate the efforts of federal, state and local law enforcement agencies, so that violent crime is checked everywhere. I strongly support efforts to ensure that rural areas receive their fair share of federal crime-fighting resources.

MANDATORY MINIMUM SENTENCES

Many within the law enforcement community are concerned that the constant attacks on mandatory minimum sentences may make serious inroads with the Clinton Administration. Yet prosecutors and police tell me the mandatory minimum sentences represent one of the few areas where we have been effective in the war on drugs.

- (1) Do you support the establishment of mandatory minimum sentences for certain crimes?

I support mandatory minimum sentences for certain crimes. I believe that, in the right circumstances, such sentences can provide both an important deterrent against crime and an important tool to prosecutors.

- (2) How do you feel the enactment of mandatory minimum sentences has impacted upon the federal sentencing guidelines?

Mandatory minimum sentences have reduced the flexibility afforded to the sentencing judge by the Sentencing Guidelines. As my answer above indicates, I believe there are circumstances in which the advantage of having a statutorily mandated minimum sentence outweighs the advantage of having flexibility in sentencing.

FORFEITURE LAWS

Federal forfeiture is another area of federal law targeted toward drug dealers, particularly the major kingpins.

- (1) Do you support maintaining current criminal and civil federal forfeiture laws?

Criminal and civil federal forfeiture laws are critical tools in federal law enforcement. While some modifications to current forfeiture laws may be appropriate to guarantee fairness, and others may be appropriate to expand the reach of such laws, under no circumstance would I support the elimination of civil or criminal forfeiture laws.

INDIAN COUNTRY

LAW ENFORCEMENT

Federal prosecutors and law enforcement agencies, particularly the FBI, serve essentially the same role in Indian Country regarding felony crimes as states attorneys and sheriffs do for the rest of our population. However, federal law enforcement personnel are not elected by the tribal constituency they serve. Therefore, it is possible for them to be less aware of tribal law enforcement concerns.

- (1) Will you work to ensure greater department-wide sensitivity at the Justice Department to tribal law enforcement concerns?

I believe that the Department is currently taking important and innovative steps to maximize sensitivity to tribal law enforcement concerns within Department of Justice, and I fully support those efforts. The Attorney General has formed a Native American Task Force which, through working groups, is addressing a wide range of issues of concern to Native Americans, including law enforcement issues.

As one project of the Task Force, the Attorney General, with the Secretary of the Interior, recently attended a "listening conference" -- where representatives of American Indian tribes had an opportunity to set the agenda and make sure that they were

heard by the federal government on issues of importance to them. First on the list of topics the tribes discussed was criminal justice and law enforcement.

- (2) If so, how can we ensure there is a clear line of communication between Federal law enforcement and Indian Country residents?

The "listening conference" is one step along the road to ensuring that communication on this important issue is institutionalized. Other efforts are also underway.

Each U.S. Attorney's office in the country has a Law Enforcement Coordinating Council (LECC) which works to bring together federal, state, and local law enforcement agencies for cooperative efforts and information sharing. In areas with substantial American Indian populations, the LECC's have worked to provide opportunities for linkage with tribal law enforcement personnel. The Department also is planning the establishment of an Indian Felony Task Force to coordinate U.S. Attorney Offices with each other and with various investigatory agencies having responsibility in Indian Country.

In addition, the Department will continue to encourage the creation of Multi-Disciplinary Teams to assist in the prosecution of child abuse and neglect cases. The Department also will work to evaluate the capabilities of tribal courts to ensure that tribal and federal officers work together with Indian Country residents. Coordination and communication between Federal authorities and Indian authorities on law enforcement matters represents an ongoing commitment of the Department.

TRIBAL SOVEREIGNTY

Congress, around the turn of the century, invited non-Indians to homestead on Indian reservations. Part of the public policy behind this was to assimilate Indians into the predominantly non-Indian culture. This is no longer the policy of the United States government.

Today, however, ranchers and business owners in my state, who operate on fee-owned land within the boundary of Indian reservations, have been the targets of laws passed by the reservations' governing tribal leadership that require them to pay a licensing fee or risk civil fines and forfeitures. The ranchers and business owners feel this amounts to "taxation without representation" because they have no means to participate in tribal government, which is open only to Indians.

Tribal leaders maintain that such laws are within their sovereign rights. To resolve this and similar jurisdictional problems, these business owners must go court, which costs them considerable time and expense.

- (1) What do you think Justice Department policy should be toward a governmental entity that exercises power over residents of an area under its jurisdiction if those residents cannot participate in that government?

For decades, the policy of the Justice Department and of the United States government has been that tribes are quasi-sovereign

entities that possess certain types of regulatory authority on their lands. The courts have, in general, affirmed the regulatory authority of tribes.

Because of this, tribal regulation of non-Indians in Indian Country presents difficult questions which affect the lives of both tribal members and non-Indians. The precise scope of tribal authority cannot be addressed in the abstract. For that reason, issues of the type you have raised are considered on a case-by-case basis, with a recognition of the legal precedents granting certain regulatory authority to the tribes and an effort to be fair to all concerned.

- (2) Do you think it is right for American citizens to be subject to a government's control, particularly a tribal government, if they have no ability to participate in that government?

The relationship between the United States government and the various Indian tribes is a government-to-government relationship that traces its roots to treaties entered into between sovereign governments. The tribes, therefore, retain broad sovereign authority over their lands. The extent to which non-Indian input in the affairs of tribes is consistent with tribal sovereignty is a thorny question with which we continue to struggle.

- (3) What problems do you see in the area of Indian jurisdiction?

A number of new and significant case decisions have recently been handed down by the Supreme Court regarding Indian jurisdiction. The biggest problem we face at the Department of Justice is properly interpreting these new cases. This area of law is in substantial flux right now, and properly interpreting the new cases will be complicated and critical.

Many people in south Dakota tell me that often they feel the Justice Department does not seriously consider the state's legal and factual arguments with regard to controversies involving Indian tribes.

- (1) Will you work to assure that Justice Department officials give fair consideration to the states before making decisions on whether to enter into litigation on controversies involving the Indian tribes and the states?

Justice Department officials must give fair consideration to the views of the states before entering into litigation involving tribes. The Department will continue to consult with the states before we file suit in such cases.

The United States does, however, have certain obligations to tribes that arise because of the government-to-government relationship between the United States and the tribes, and because the United States holds property in trust for tribes. Although, by law, the United States' duties on behalf of tribes will at times conflict with the interests of the states, every effort will be made to resolve contentious matters between them fairly and equitably.

In the non-litigation context, there are channels for the states to make their grievances known -- and they do. One channel is the "Executive Working Group", which is composed of representatives of the Justice Department, as well as the National Association of Attorneys General and the National

District Attorneys Association. The Executive Working Group provides a forum for state and local law enforcement officials to make their concerns about tribal matters clearly known to the federal government. We must continue to make sure this group provides the communication necessary in this volatile area.

- (2) How much deference do you believe the Justice Department should give to recommendations by the Department of the Interior on legal matters affecting the Indian tribes?

The Justice Department represents the Interior Department, and its positions, to the best of its ability. Accordingly, recommendations or information provided by the Interior Department are given great weight, though the Department of Justice provides independent legal analysis.



U.S. Department of Justice

Environment and Natural Resources Division

Washington, D.C. 20530

MEMORANDUM

To: Janet Reno
Attorney General

From: Peter Anderson Farleigh Earhart Rick Filkins
Steven Herm Herb Johnson Jeremy Korzenik
Anna Matheson Neal McAliley James Miskiewicz
James Morgulec Peter Murtha Eric Nagle
Bruce Pasfield Paul Rosenzweig John Smeltzer
Christina Steck Richard Udell David Uhlmann

Trial Attorneys
Environmental Crimes Section

Subject: Statement of the Above-listed Trial Attorneys in the
Environmental Crimes Section

Date: March 3, 1994

During the past eighteen months, three Congressional reports and numerous news stories have alleged that the Environmental Crimes Section has interfered with environmental enforcement for improper political reasons. As trial attorneys in that section, we have prepared the following statement about those allegations:

1. The 30 attorneys of the Environmental Crimes Section fulfill an essential role in the environmental enforcement effort of the Department of Justice and the Environmental Protection Agency. Over the seven years since the section was formed, our office has participated in hundreds of cases and provided training for prosecutors and investigators handling environmental cases nationwide. Our significance is not merely historical. During the first year of the Clinton Administration, attorneys in our section have prosecuted dozens of cases and provided significant support for the prosecutions of dozens more handled by United States Attorney's offices. The Environmental Crimes Section, as should be the case, has more trial attorneys dedicated to prosecution of environmental crimes than any other office in the country -- and represents by far the greatest concentration anywhere of lawyers with environmental crimes trial experience.

2. Congressional reports and media coverage alleging that attorneys in our section have obstructed or impeded the effective prosecution of environmental crimes are false. While there have been substantial differences among the attorneys in our office over the merits of individual cases and how best to manage the section, we believe that every attorney in the office shares our fundamental commitment to vigorous prosecution of environmental crimes. The allegation that section chief Neil Cartusciello and others within the section have interfered with our cases for "political" reasons or to undermine effective environmental enforcement is false. Likewise, the suggestion that our section has been weakened by the hiring of recent law school graduates through the Honors program is untrue. Like their counterparts throughout the Department, the Honors graduates in our office are a tremendous resource. They have played critical roles in some of our most significant cases, including the Exxon Valdez, Baytank, Ekotek, Pacific Enterprises, and Brittingham, while also contributing to the section's legislative and training programs.

3. It is wrong for the Department of Justice to remain silent while the reputations and efforts of Department attorneys are smeared by Congress and in the press. For more than 18 months, there have been attacks against our section, its managers, and various staff attorneys within the section. Those who have been maligned are people we work with every day; many have contributed years of government service prior to their arrival in our section. We know they are suffering great pain because of the unfounded attacks against them. While we are confident that the Department's internal review will reject the allegations of improper interference with environmental enforcement, that review remains incomplete nine months after it began -- and the performance of the section continues to be distorted and mischaracterized. The attorneys who have been attacked are career prosecutors who exercised their best legal judgments in difficult cases. The continued silence of the Department has been viewed by many as a tacit admission that the charges are true, which hurts not only those personally attacked, but every attorney in the section. Moreover, left unchallenged, those charges undermine our shared goals of environmental protection.

MEMORANDUM

To: All Section Line Attorneys
 From: Jim Miskiewicz, Peter Murtha, Eric Nagle, David Uhlmann
 Re: Follow-up to AG Meeting
 Date: March 4, 1994

This is a report on some of the highlights of the meeting that took place yesterday between Section line attorneys and the Attorney General, as well as an invitation to all line attorneys to attend a meeting this afternoon to discuss how best to follow-up on some of the recommendations that came out of the meeting.

The memorandum to the AG that had been circulated to the Section yesterday was ultimately signed by 18 of the Section's 25 non-management line attorneys--17 of whom attended yesterday's meeting. As had been previously agreed to by the group, a presentation was made to the AG by only a few of the attorneys present including Eric, David, Paul, Jeremy and Jim Misk. The principle points made were as follows:

a. The Section plays a unique and valuable role in the United States' ability to criminally enforce environmental laws, as demonstrated by our work in cases like Exxon Valdez, Khian Sea and Brittingham.

b. That Honor's Grads, as well as senior trial attorneys, contribute greatly to the successes of the Section.

c. That the public excoriation of individual prosecutors within the Section, Honors Grads generally, and the Section as a whole has been extremely damaging to the lives and careers of those individuals criticized, as well as to the morale of the entire Section.

d. That we believe the charges of political impropriety and interference with the enforcement program are false. We know these people who've been the targets of these charges, and we know they are committed to vigorous career prosecutors, not "water carriers" for any political agenda.

e. That the incessant criticism of the Section, and continued silence from the Department's leadership pending completion of the internal review, undermines the ability of line attorneys to work effectively with agents and USAO's.

As to this latter point, which took up the bulk of the meeting, the AG was given a series of recent examples of the difficulties facing line attorneys. These included cases occurring within the last few months in which AUSA's and Section attorneys have held up either commencing or declining a potentially high-profile investigation for fear of rebuke from EPA in the event the investigation failed to turn up a prosecutable case; instances in which EPA agents have explicitly threatened to "haul" prosecutors before Congress if they did not pursue cases regardless of prosecutorial merit; an instance in which a plea agreement worked out by a Section attorney and AUSA could not be finalized until the U.S. Attorney himself had obtained assurances from an EPA SAC that the EPA would not use the agreement to advance the thesis that the Section obstructs environmental enforcement; and an example in which a U.S.

Attorney took the occasion of a successful conclusion of a difficult joint investigation to express his reservations about allowing Section attorneys working in his district given all he'd heard and read in the media about us.

In response to each, the AG exhibited a great command for the difficulties the Section faced, familiarity of the kinds of threats reported. (She specifically mentioned that such behavior was not uncommon in Dade county police officers, some of whom threatened to take their grievances about the handling of cases to the media). She articulated a willingness to use her office to support the decisions of line attorneys--either with EPA or before Congress. She encouraged line attorneys who have been so threatened to come forward, advise her of the events, allow her to make a determination of the case merits, and then contact EPA, not for the purpose of "hauling an agent on the carpet" but rather, to advise the Agency that she was satisfied with the decisions of her line attorneys.

She also spent considerable time emphasizing her support for the Section's work, but cautioned that in her view the best prescription for getting beyond the current controversies surrounding the Section is to move forward, make cases, build better relations with USAO's and EPA. To that end, she awaits the completion of the internal review report, and estimated at some point that the report may be complete within the next "week or two".

Finally, she encouraged the Section's line attorneys to provide information and suggestions to her that we believe may help put the Section back on a strong footing. She specifically suggested the following: providing her with a list of recent Section achievements, develop ideas for Op-ed pieces, that she would sign, highlighting either the work of the Section, or aspects of environmental criminal enforcement.

All in all, it was an extremely positive meeting. She assured us that we as a Section "don't look as bad as you think." And she pledged her willingness to help move the Section out of its current troubles.

In the spirit of trying to broaden lines of communication among Section attorneys, and to develop a response to the requests the AG made, we are calling a meeting today of all Section non-management line attorneys to be held in the 6th floor conference room at 3:30 pm. In light of possible scheduling conflicts, we'd like to keep the meeting to about an hour--give or take--and limit the topics of discussion to the following:

- a. Respond to any additional questions anyone might have about the meeting.
- b. Further discuss the issue of how to deal with agent threats.
- c. Develop a list of recent cases that Section attorneys agree exemplifies some of the good work we do.
- d. Discuss possible ideas for the type of Op-ed piece the AG indicated she would be willing to co-author.



HISPANIC BAR ASSOCIATION of the District of Columbia

Post Office Box 1011 Washington, D.C. 20013-1011

March 15, 1994

Hon. Carol Moseley-Braun
U.S. Senate Judiciary Committee
Washington D.C. 20510

Dear Senator Moseley-Braun:

I am writing to let you know about Jamie Gorelick and her past involvement with the Hispanic Bar Association of the District of Columbia. In 1993, our Association, one of the largest local Hispanic bar organizations in the nation, honored her at our Hugh Johnson Memorial Awards Dinner.

As you may know, Hugh Johnson was an aide to Congressman Mickey Leland on the House Select Committee on Hunger and died with him in a tragic plane crash while engaged on a mission to alleviate famine in Ethiopia. Mr. Johnson's widespread involvement in the Hispanic community's legal concerns made him a bridge between the African American and Hispanic communities in the District of Columbia.

Similarly, Ms. Gorelick, during her tenure as President of the D.C. Bar, went out of her way to include our bar association and other minority bar associations in the core decision making of the organized bar. She assisted us in empowering ourselves and laid the groundwork for the first ever Hispanic appointment to the D.C. Judicial Nominations Commission. The attention she gave to issues of race, ethnic and gender bias in the legal profession were of prime importance to our community as well. Finally, Jamie Gorelick's leadership ability and organizational talents will serve her well in the position to which the President has nominated her.

Sincerely,

Maria Holleran-Rivera

Maria Holleran-Rivera
Former President
Hispanic Bar Association of the
District of Columbia



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